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(a) GENERAL

210.0012 **Accommodation Loans of Rental Equipment.** A company acquires electronic leveling equipment. It reports use tax measured by its rental receipts. Accommodation loans of the rental equipment are made to clients whose property is being repaired. If the repair work to be done is under warranty, a ''no charge'' invoice is prepared. If the repair work to be done is not under warranty, a $100 fee is charged for the loaned equipment. Use Tax is not reported on either of these types of transaction. The company claims the $100 fee is a re-calibration fee which covers recharging the instrument and preparing it for return to rental inventory.

It is clear that the company's consistent policy where nonwarranty work is to be done is that the rental equipment will not be transferred without a flat rental fee of $100.00. While it appears to be a reduced rent, it is mandatory consideration received for the transfer of tangible personal property. This mandatory fee fits the definition of consideration sufficient to support the finding of a ''sale'' and is subject to tax as part of the ''sales price.'' A loan in which no consideration passes is a ''use'' of ex-tax inventory inconsistent with holding the item for resale. When such use occurs, the measure of tax is the fair rental value. Since the company charges $100 for the loans on nonwarranty repair items, the taxable fair rental value for the equipment used for accommodation loans for warranty repair is also $100.00. 4/23/92.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

210.0019 **Aircraft.** The use of an aircraft by an aircraft dealer to transport executives and other people, when these people are not potential purchasers, is not a use for demonstration and display under Regulation 1669. Such use is subject to tax as set forth in Regulation 1669(f)(1)(C). When the taxpayer elects to pay use tax based on the fair rental value of an aircraft held for resale but used for other purposes (as opposed to paying tax measured by the cost of the aircraft), the tax is applicable even if the aircraft is used outside California for purposes other than demonstration and display. 6/29/71.

210.0020 **Aircraft.** An airplane held for sale which is flown around the country to develop interest and which is used by the taxpayer to keep it in condition and to instruct himself in its proper use, held not subject to use tax. 8/10/65.

210.0041 **Benchmark Testing.** Computers and computer components withdrawn from an inventory of items purchased for resale solely for the purpose of demonstrating their performance levels by establishing benchmarks and then returned to inventory and held for sale in the regular course of business are considered to have been used for demonstration only. The establishment of benchmarks by laboratory testing allows customers to make comparisons among products and obviates the need for demonstrations for individual customers. The benchmark testing is not a taxable use of the product. 4/6/94.

210.0045 **Brood Mares—When Use Occurs.** The following are guidelines to determine if ''use'' is made of a brood mare held for resale.

(1) If a brood mare has two or more foals as a result of having been bred while owned by the person holding the mare for resale, the owner has made a taxable use of the horse as a brood mare since this is substantial evidence that the breeding was not a utilization either incidental or necessary to effect a sale.

(2) Generally, a taxable use will also be found if a brood mare, held for resale, has been capitalized and treated as a depreciable asset for federal and state income tax purposes.

(3) If a retailer of horses retains a brood mare for resale over two full years, regardless of whether it has ever foaled, the individual case would be suspect and presumed taxable.

(4) A mare having been bred in two successive breeding seasons or sold with a single foal at her side or sold while in foal and with a single foal at her side will not dictate a finding that there is a taxable use inconsistent with that of holding the brood mares for resale. 9/19/85.

210.0049 **Bumpers Used to Make Templates.** A company is engaged in the business of repairing and rechroming auto bumpers and parts on an exchange basis. In order to speed the replacement of a damaged bumper, the company maintains a stock of exchange bumpers. The customer will receive an exchange bumper of the same kind that is turned in. At the beginning of the model year, new bumpers are often purchased to have exchange stock ready. In order to repair dented bumpers to the proper dimensions before rechroming, dimension templates can and may be made from new bumpers or from bumpers with

damaged finishes which have the original dimensions. In some instances, templates are made from new bumpers purchased from the exchange stock. Templates are made by placing the bumper on a sheet of paper or masonite and tracing the outline in pencil. The tracing takes a matter of minutes. No damage or change to the bumper results from this process. The template is used to compare reformed bumpers with the original dimensions.

The making of a template is essentially a measuring process which is not inconsistent with the company's holding the items for resale and under these conditions is insignificant. No substantial use is made of the bumpers. No tax liability arises out of such limited use. 7/28/67.

210.0055 **Candles.** A candle retailer who has purchased candles for resale partially burns some of them to show the designs such candles form after they are burned. The partially burned candles are left on display. Although the candles have been used only for demonstration and display, they are no longer being held for resale in the regular course of business, and the candle retailer has made a taxable use of the partially burned candles. 8/2/67.

210.0057 **Carpet Samples.** Carpet wholesalers purchase samples ex-tax for resale and later resell them to retail dealers. The only use made of the samples prior to sale is demonstration and display. Since carpet wholesalers regularly sell the samples to their dealers, the demonstration and display use is being made while the samples are being held for sale in the regular course of business. This position is consistent with the treatment of vehicles used only as demonstrators but being regarded as being held for sale in the regular course of business even though not actually offered for sale until a later date. There is no use tax liability resulting from the purchase and use of the sample.

The subsequent sale of the samples to dealers who have submitted resale certificates for ''carpeting and rugs,'' may also be nontaxable if the samples are of a size that could be used as throw rugs or mats, and the dealers' use is limited to demonstration and display. Samples larger than 22″ x 18″ would meet this size standard. All samples size 22″ x 18″ or smaller, all samples bound in sample books, and all samples having holes with metal grommets inserted would be considered not sold for resale unless the dealer had submitted, and the wholesaler had accepted in good faith, a resale certificate specifically describing them. 7/17/67.

210.0058 **Carpet Samples.** When a carpet dealer purchases samples with a definite intention of eventually selling them, after their use for demonstration and display has ended, the sale of the samples to the dealer qualified as a sale for resale and is not subject to tax. However, samples of a size so small as to prevent any practical use being made of them are not normally intended to be resold. 10/6/82.

210.0060 **Charge for Demonstration.** If an aircraft is used solely for demonstration or display purposes while being held for sale, the dealer will not incur liability for use tax simply because he makes a charge to the prospective customer to whom the plane is demonstrated but who fails to purchase the plane,

provided the charge is no more than the actual expense incurred in the demonstration. Notwithstanding the making of the charge, it does not appear that the law requires application of the tax if no actual use of the article other than demonstration while being held for sale is made. 6/21/57.

210.0065 **Clearing House for Nonprofit Agencies.** A clearing house, which is a nonprofit corporation, accepts goods and services as donations to charity. When received, a value is placed on the donation for distribution purposes. Credits are given to member agencies who could exchange the credits for the donated goods and services. In this way, the goods are distributed under a fair system among member agencies. No sale is involved in exchanging credits for goods or services and no tax is due.

The clearing house also accepts donations of goods that cannot be used by member agencies and trades them to retailers or distributors for goods that member agencies can use. The transfer of nonusable goods by the clearing house is a sale for resale and tax would not apply. However, the transfer of goods to the clearing house is a retail sale. The transferor is liable for sales tax and could charge tax reimbursement to the clearing house. 4/24/95.

210.0068 **Clothing Samples.** Clothing samples purchased from a clothing manufacturer by its salesmen and which are subsequently sold to retailers for sale at retail may be nontaxable as sales for resale.

This conclusion is based upon the finding that the merchandise was held for sale, was subsequently sold to retailers for sale at retail by the salesmen, and that no use other than demonstration and display was made of the merchandise while holding it for sale. 1/15/63.

210.0085 **Demonstration to Sales and Service Personnel.** Demonstration of equipment to sales and service personnel and compatibility testing to determine whether the property is compatible with other equipment is ‘‘demonstration and display’’ under the sales and use tax law. 2/5/90.

210.0095 **Distribution of Partnership Share of Horse.** A partnership was formed by two corporations for the purpose of purchasing a thoroughbred stallion for syndication and subsequent sale of 40 equal shares. The horse was acquired from an owner in Ireland and put to stud on a California farm. Each partner made an initial capital contribution of $1,000 and co-signed a purchase money note to the bank for $425,000.

The partnership agreement provided that any syndicated shares not sold by a specific date were to be divided equally between the two corporate partners. When the final twenty shares of the syndicate could not be sold, they were distributed equally between the two corporate partners.

When the partnership distributed the twenty shares to the corporate partners, a taxable use of that 50 percent interest in the horse took place since the horse had been purchased for resale. Consequently, the partnership is liable for use tax based on one half the cost of the horse. 9/02/92.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

210.0110 **Equipment Loans.** A company purchases, under a resale certificate, surveying equipment of a kind which it routinely resells at retail. A portion of this equipment is allocated to a rental pool inventory. The taxpayer has elected to pay tax based on the rental receipts method. The company gratuitously loans equipment from the rental pool inventory to purchasers if any equipment that the company previously sold breaks down and needs repair. The company believes that the equipment loans to customers for which no rental receipts were generated were accommodation loans and exempt from tax. The company relies on its election to pay tax on rental receipts as the basis to assert that no tax is due. It reasons that no rental receipts were obtained from the accommodation loans and, by paying tax on rental receipts, it meets all of its tax obligation related to the equipment.

Rather than imposing use tax on the full purchase price of property purchased under a resale certificate and then used for "accommodation loans," the legislature has provided that tax will be measured only by fair rental value for the period of such loans provided the property is otherwise held for resale. There is no provision in the Sales and Use Tax laws that would allow a purchaser to acquire equipment ex-tax for exclusive use as loaners. Only items held for resale may be acquired ex-tax. Loans of ex-tax inventory are taxable regardless of whether the loans are for personal purposes or for accommodation loans. The express statutory mandate in the Code requires taxes on accommodation loans measured by fair rental value. 2/19/92; 5/19/92.

210.0116 **Erroneous Taking of Depreciation.** The taking of depreciation on property for income tax purposes is generally regarded as evidence that the property was not purchased for resale. However, where the depreciation was taken in error, tax will not always apply. Tax will not apply if (1) the depreciation deduction was taken in error and the taxpayer did not realize a tax advantage therefrom, (2) there is convincing evidence that the property was purchased for purposes of resale, and (3) the taxpayer made no taxable use of the property while holding it for resale. 1/5/94.

210.0120 **Examination Copies of Text Books Furnished to School.** In negotiating for the sale of text books to a school, a publisher furnishes examination copies. After the sale, the school retains the examination copies for use as desk copies. Under such circumstances, the examination copies are regarded as having been used for demonstration and display and the selling price for the total order is regarded as including the desk copies. Accordingly, no additional tax is due with respect to the examination and desk copies. 5/11/67.

210.0140 **Exhibit in Museum.** Works of art purchased solely for the purpose of lending them to public museums for exhibition are not exempt from the sales and use tax since the works of art were not purchased for resale. The works were exhibited to the public, not to facilitate the sale of the art but to benefit the public, and this is a taxable use of tangible property by its owner. 4/11/69.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

210.0152 **Furniture Use in Model Mobile Homes.** When a mobile home dealer also sells the furniture displayed in its mobile homes, such furniture is generally regarded as being held for resale by the dealer. While the furniture may enhance and, thus, demonstrate the interior of a mobile home, it is also being displayed for sale. The fact that it enhances another item being sold would not result in a taxable use. It is similar to displaying a lamp on a wood table, both of which are being held for resale. 3/20/81.

210.0160 **"Held for Sale."** If a machine is used exclusively for demonstration purposes and is later sold, it is properly regarded as being held for sale even though it may be intended for use as a demonstrator and not actually offered for sale until usefulness as a demonstrator has ended. 6/29/56.

210.0170 **Intervening Use.** Tax applies to any intervening use of property purchased for resale even though the property is subsequently sold as "new" within a reasonable period of time. (Regulation 1669 and section 6094). 2/5/90.

210.0180 **Jewelry Worn by Actress.** The gratuitous furnishing of expensive jewelry, not imitation or costume jewelry, to a motion picture studio for the use of an actress while making a motion picture is a demonstration. There is no depreciation in the value of the jewelry and the jeweler is seeking to sell his merchandise. 5/13/59.

210.0194 **Leased Equipment Held For Resale by Lessee.** Taxpayer manufactures and sells specialized equipment. The taxpayer sold a piece of this equipment to a Financial Institution (FI) and leased it back. The lease agreement was for 36 months with an option to purchase the equipment for $251, consisting of an "option price" of $1 and a "termination fee" of $250. The purchase price exceeds the limits for a purchase option to be considered "nominal" under Regulation 1660 and therefore the contract is a true lease. The FI did not issue a resale certificate nor was sales tax paid at the time of the sale to the FI. The FI billed the taxpayer use tax on the monthly lease amount, but the taxpayer refused to pay the use tax contending that the equipment is held for resale and is used specifically for nontaxable demonstration purposes.

Under these specific facts, the taxpayer has used this method for financing what amounts to a part of its resale inventory. Whether the contract between the taxpayer and the FI is a lease or not, under these specific facts the taxpayer is holding the equipment for resale. Thus, no tax applies until the taxpayer sells the equipment. The taxpayer may properly issue a resale certificate to the financing company for the equipment. 12/29/95.

210.0200 **Loans of Video Tapes to Employees.** As an employee benefit, employees of a video tape sales and rental business are allowed to "rent" tapes purchased for resale for free. These rentals to the employees are taxable and the measure of tax is the fair rental value for the period of such use, as provided in Regulation 1669(f)(1)(B). 8/18/94.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

210.0280 **Measure of Tax—Fair Rental Value.** Where out-of-state manufacturers sell goods to California customers and loan equipment to the customers until delivery of the property purchased, tax applies to the fair rental value of the property for the duration of the loan. The benefits of Sections 6094 and 6244 apply to out-of-state sellers as well as California sellers. 11/19/68.

210.0300 **Model Homes.** A home developer who purchases furniture to place in model homes may not purchase that furniture ex-tax for resale. The intended purpose of the furniture is not merely for demonstration and display but for promoting the sale of the homes. 9/30/64.

210.0320 **Model Kitchen.** Where a utility purchases appliances for use in a model kitchen, the purchase is for a purpose other than resale, i.e., use in promoting the sale of electrical energy. Such use constitutes a use other than demonstration or display, and is subject to tax. 6/17/55.

210.0340 **Musical Instruments.** Demonstrating to a customer is not a taxable use. However, the use of an instrument in giving a lesson for which a charge is made is a taxable use. 1/11/55.

210.0380 **New Machine.** A demonstration results when a dealer, pursuant to the manufacturer's policy, loans a new business machine to the owner of an old machine while the owner is traveling away from home, the purpose being to demonstrate the superiority of the new machine over the older machine. 7/13/59.

210.0420 **Out-of-State Customers.** A manufacturer of gas lasers loans them from stock and delivers them outside this state to out-of-state buyers who have contracted to buy other lasers which are not ready for delivery. When the manufacturer sends the laser that the customer ordered, the loaned laser is in all cases returned to the California manufacturer, who then checks, calibrates, and returns it to stock to be sold as new equipment. Sometimes the returned laser will be loaned again under like circumstances. Held: The manufacturer will not be considered to be making a taxable use of the loaned laser by virtue of the use of the out-of-state customer. 2/2/65.

210.0430 **Personal Use of Video Tapes.** A lessor of video tapes, video cassettes, and video discs lends these items to its employees at no charge. The lessor is considered to be holding these tapes for demonstration and display and is actually selling them (in continuing sales). Its use of the tapes by lending them to its employees is not inconsistent with its continued resale of them. Thus, pursuant to Regulation 1669(f)(1)(B), the lessor owes tax measured by the fair rental value when lending tapes to its employees. The fair rental value would be the amount the lessor would charge a nonemployee for rental of the tape. 12/30/93.

210.0445 **Photography of Original Art.** A taxpayer purchases original art ex-tax under resale certificates. All rights of reproduction are purchased with the works of art. The artwork is photographed and lithographs are prepared from the photographs. The lithographs are sold. The original art is ultimately also sold. The photography of the artwork for purposes of preparing lithographs constitutes

DEMONSTRATION, DISPLAY, ETC. (Contd.)

a use of the artwork which is beyond demonstration, display or retention while holding it for sale in the regular course of business. Tax applies to cost of the artwork to the taxpayer. 7/14/94.

210.0450 **Property Used for Demonstration and Other Purposes.** A software developer sells a software program to customers most of whom already have the hardware to operate the software program. Occasionally, the developer will sell a complete system which includes hardware and software. The developer does not have a showroom, but potential customers can come to its premises for software demonstrations. In some transactions, the developer will bring the hardware and software to the potential customer's place of business. The developer uses hardware which was acquired ex-tax from out-of-state vendors or under resale certificates to test and refine its software and to demonstrate its software to potential customers. Such usage constitutes taxable use. The issue is whether the developer's liability is measured by the full purchase price of each piece of hardware or by the fair rental value of the hardware for the periods during which it was being used for testing and demonstration of the software.

Unless the developer frequently demonstrates the hardware itself, the measure of tax is the full purchase price of the hardware and not its fair rental value. A taxpayer may be regarded as frequently demonstrating property purchased for resale even though the same use has a dual purpose, e.g., demonstration of the property itself and demonstration of other property (in this case software). Where most of the developer's customers already own the hardware necessary to run the developer's software programs, most of the developer's demonstrations are for the sole purpose of demonstrating the software and not for the purpose of demonstrating the hardware in an effort to make a sale of the hardware. As such, the hardware is not frequently demonstrated and the measure of tax is the full purchase price of each piece of hardware. 9/19/94.

210.0470 **Sample.** Yardage goods were purchased ex-tax by an apparel manufacturer specifically for use in the designing and production of style samples. These samples are shown to buyers (major retail chains) who order from the selection. All samples produced are eventually sold through the manufacturer's own retail outlets, which specialize in seconds.

The labeling of an item as ''samples'' and the fact that the samples are sold as seconds are not criteria for the imposition of the use tax. The main criterion is whether there has been an intervening use ''other than retention, demonstration, and display while holding it for sale in the regular course of business.'' In the above situation, the purpose of the manufacturer's ex-tax purchase was to utilize the yardage by incorporating it into the manufactured article, i.e., the samples. The samples were then used solely for demonstration or display while holding them in the regular course of the manufacturer's business. Such a use is nontaxable. 7/1/77.

210.0480 **Samples.** A manufacturer of women's apparel which purchases garments of other manufacturers to use as style samples is liable for use tax on the cost of the samples, as well as for sales tax on gross receipts derived from their

subsequent sale. The manufacturer's use of the garments in designing its own products is a use other than retention, demonstration or display while holding the garments for resale. 10/14/64.

210.0485 **Samples vs. Marketing Aids—Carpets.** The term samples should be used only in reference to area rugs or carpets which are held for demonstration and display and are subsequently sold to customers. On the other hand, carpet remnants that are bound together to form swatch books are regarded to be marketing aids, and the rules explained in Regulation 1670 apply. Thus, a person such as a manufacturer or wholesaler is the consumer of a swatch book which the person transfers for less than 50 percent of that person's purchase price. For the manufacturer, the purchase price is generally the purchase price of the materials it incorporates into the marketing aid. A person is the seller of the marketing aids which it transfers for 50 percent or more of that person's purchase price and sales or use tax applies to the sales price charged the customer for the swatch book. 9/26/95.

210.0506 **Swatches.** When material is purchased to be used as swatches and there is no intent on the part of the purchaser to make any resale of this material, the swatches are not for retention, demonstration, or display while holding them for sale and, therefore, the sale to the retailer-purchaser is subject to tax. However, when a retailer purchases swatches which he plans to eventually sell for use as pillow cases, slip covers, or hot pads, the use of these to demonstrate or display a selection of materials occurs while holding them for sale and is not subject to tax. The distinction between the two cases is that in the former the retailer has no definite, concrete plan to sell the materials, while in the latter there is such a plan. 2/7/61.

210.0510 **Testing of Printers.** Printers are sold to a purchaser for testing to determine whether the printers meet the standards of the purchaser who is a vendor of printers. The printers are tested for approximately two months and are either sold or destroyed if unable to be sold.

Under these facts, the testing is a use of the printers other than solely for demonstration or display while being held for sale in the regular course of business. 6/30/93.

210.0560 **Testing, Training, Use for.** The following uses of items or equipment, withdrawn from inventory, constitute nontaxable demonstration and display:

(1) Equipment used to train prospective buyers.

(2) Equipment used for testing to determine whether they meet quality standards. 7/21/67.

(3) An item tested to determine whether that item will function with other equipment as a part of an equipment system.

(4) Equipment used to train sales personnel and familiarize service personnel in the use and operation of equipment to be sold.

The following uses of equipment withdrawn from inventory are not within the meaning of demonstration or display, and are subject to use tax:

DEMONSTRATION, DISPLAY, ETC. (Contd.)

(1) Equipment drawn from a production line and used to test other equipment.

(2) Equipment used in actual repair training. 11/9/90.

210.0580 **Transportation of Executives—Or Engineering Tests.** Aircraft to transport executives and other people on one-way trips, such people not being potential purchasers, or use of aircraft extensively for engineering tests, do not constitute ''demonstration or display'' and are taxable uses. 1/12/55.

210.0588 **Use of Aircraft.** An aircraft is withdrawn from resale inventory nine times for use prior to its sale. Three times it is leased, three times it is used for personal purposes, and three times it is used for air taxi operations involving common carriage of persons or property. Tax is due on the fair rental value for the personal purposes and the leasing but is not due on the fair rental value for the use of the aircraft in common carrier operations since such use is exempt under section 6366. Also, tax applies to the fair rental value of the other uses only during the time the aircraft is within California. 11/4/80.

210.0593 **Use of Equipment Prior to Lease.** An out-of-state taxpayer sold a laser photoplotter to Corporation A who also is located out of state. The taxpayer was instructed to ship the equipment to Corporation B located in California. The equipment was shipped from an out-of-state point to Corporation B in February 1989.

Corporation A and Corporation B signed an agreement on May 15, 1989 in which Corporation B could use the equipment at no charge until October 1, 1989. Corporation B had an absolute right to terminate the agreement until September 30, 1989. The lease and the monthly rental payments, in the amount of $4,840, were to commence October 1, 1989 with final payment due on September 30, 1999. There was no provision or option for Corporation B to purchase the equipment after the lease had terminated.

Corporation A had an arrangement with Corporation B whereby Corporation B was to be allowed to use the photoplotter on an experimental basis for the first seven or eight months (equipment delivered in February 1989) to determine if Corporation B was able to find enough customers in California to lease the equipment. Also, Corporation A was hopeful of obtaining customers for its circuit board business from Corporation B's activities. Corporation A and Corporation B depended on each other for support in case either of its machines broke down.

The issue of this case is whether the sale was a sale for resale or was a retail sale. During the period from February 1989 through September 30, 1989, Corporation A was using the equipment in California by loaning it to Corporation B. Corporation A's intent at the time of purchase was to give Corporation B an opportunity to use the equipment on a trial basis for about eight months with an option of leasing it after September 30, 1989. The purpose was to get customers through Corporation B and to have a back up when Corporation A's own photoplotter broke down. Therefore, the use of the photoplotter in the form of a loan to Corporation B was a taxable use, not demonstration or a display. Thus,

DEMONSTRATION, DISPLAY, ETC. (Contd.)

sales or use tax applies to the sale of the equipment to Corporation A because there was a retail sale. The taxpayer was correct in charging and collecting tax from Corporation A. 2/13/91.

210.0593.125 **Use of Stallions and Mares.** The test breeding of a stallion five or six times, in a year during which it was being held for resale, with no fee being charged to the owner of the mares, is consistent with nontaxable demonstration and display. The use of a stallion as breeding stock would involve much more frequent breeding during a one year period and would, of course, produce a fee for each effort.

Similarly, the breeding of mares to demonstrate their fertility is not a taxable use. A mare sold while ''in foal'' or ''with foal at side'' does not necessarily lead to the conclusion the owner made a taxable use of the mare unless the owner has held ownership for two years or more. Other evidence of taxable use would be ownership for two years even if the mare has not foaled during that time, or the production of two foals during the period of ownership. 2/21/68.

210.0593.500 **Wine Tasting.** The use of wine by a vintner for wine tasting does not constitute demonstration and display. The vintner has made use of the wine as defined under section 6009 and is, therefore, the consumer. 2/28/94. (Am. 2000–1).

(b) LOANS TO SCHOOLS AND SCHOOL DISTRICTS—FOR EDUCATIONAL PURPOSES

Note: Section 6404, extends exemption to loans, under certain conditions, of motor vehicles to the California State Colleges, the University of California, private or parochial secondary schools, and certain institutions instructing disabled veterans in the operation of specially equipped vehicles.

210.0630 **Loan of Boats to University.** The loan by a retailer of property other than a motor vehicle to the California State University does not qualify for exemption from use under Revenue and Taxation code section 6404. 6/7/94.

210.0660 **Parochial Schools.** Use tax exemption extended to school districts for loan by retailers of tangible personal property for educational purposes does not extend to parochial schools because parochial schools are not ''school districts'' within the meaning of the law. School districts are public corporations while parochial schools are not. 12/2/69.

210.0680 **Private Schools.** Since private schools are not school districts, property loaned to them is not exempt from use tax under Section 6404. 3/8/68.

215.0000 DEMONSTRATION, DISPLAY AND USE OF PROPERTY HELD FOR RESALE—VEHICLES—Regulation 1669.5

(a) GENERAL

215.0015 **Accommodation Loan Car Programs.** Under these programs, distributors will sell vehicles to dealers under an agreement that the dealer use the vehicles exclusively for accommodation loan purposes for a certain period of

time; thereafter, the dealers are free to sell the vehicles. In many cases, the transaction between the distributor and dealer involves a finance company (generally related to the distributor) in which the vehicles purchased by the dealer are immediately sold to the finance company which leases the vehicles back to the dealer. In most cases, the lease is actually a sale at inception based on the terms of the agreement. In exchange for agreeing to the restrictions on its use of the vehicle and its ability to sell the vehicle, the dealer's lease payments may be subsidized by the distributor so that the dealer effectively obtains the vehicle at a reduced price.

Regulation 1669.5 (b)(6) provides that when a dealer provides an accommodation loan to a customer who is awaiting the repair of a vehicle leased from that dealer, the dealer is regarded as leasing the accommodation loan vehicle to its customer as part of the lease of the vehicle being repaired. If the lease is a continuing sale, the accommodation loan is part of that continuing sale because it is regarded as coming under the original lease. In this context, a dealer would be entitled to purchase a vehicle for resale in the form of accommodation loans that constitute continuing sales. No further tax is due with respect to accommodation loans made to persons leasing vehicles in continuing sales leases.

Accordingly, the dealer may issue a resale certificate to a distributor for the purchase of vehicles to be used exclusively as accommodation loans to persons leasing vehicles in continuing sales. However, when the dealer loans these vehicles to customers who own vehicles (and to those whose leases are not continuing sales) which are under repair, the dealer is regarded as using the vehicles and owes use tax measured by the fair rental value of the vehicle (section 6094(b)).

Under these circumstances, the dealer must specifically substantiate by documentation the percentage of its accommodation loans to persons leasing vehicles in continuing sales. If the dealer does not maintain and/or provide substantial and detailed documentation, (e.g., repair invoices, lease agreements, schedules, etc.) for purposes of audit or reporting, the dealer owes tax or the fair rental value for all accommodation loans of vehicles made under these programs.

In some instances, vehicle dealers do not actually lease vehicles but rather a separate related finance company or arm of the dealership or distributor becomes the ultimate lessor. Also, the lease agreements may show the dealership as the original lessor, but the lease is later assigned to separate concern where all lease payments are remitted. Considering the unique circumstances of financing and leasing arrangements made in this industry, accommodation loans provided to customers awaiting repair of vehicles leased from a separate but related entity of the dealer or distributor should be treated as one transaction for purposes of a continuing sale when the customer's lease originates through the dealer providing the accommodation loan. On the other hand, accommodation loans of vehicles made to customers awaiting repair of vehicles leased by an unrelated dealer, distributor, or franchise would be subject to tax measured by the fair rental value.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

Under these specific accommodation loan programs, if the dealer does not offer a vehicle as a daily rental, then a reasonable fair rental value of the vehicle for each month will be obtained by using 1/40th of the purchase price of the vehicle as explained in Regulation 1669.5(b)(3)(A). 6/27/97.

215.0040 **Breaking in.** The breaking in of foreign cars by a dealer driving them for 500 miles for no other purpose, does not require payment of tax upon sale to dealer. Such breaking in of the car is nothing more than preparation of the car for delivery to the customer and is not sufficient in itself to subject the dealer to payment of use tax on the theory that the car was used prior to reselling it. 9/5/50.

215.0050 **Car Dealers "Holdback Allowance."** A vehicle manufacturer contends that the factory holdback allowance should be deducted in determining the "net dealer cost" for purposes of reporting use tax on vehicles, subject to the 1/40th or 1/60th fair rental value formula, which are used as company car demonstrators. The factory holdback allowance is a percentage of the factory invoice price, varying from 2 percent to 3 percent, which is shown on the dealer's sales invoice as a memorandum entry. It is annually credited to the car dealer against amounts they owe to the manufacturer.

The "net dealer price" is the manufacturer's selling price to its dealers, including optional extra cost equipment, before any discounts or rebates. It also includes the federal excise tax, but does not include destination, handling, and other charges." Therefore, for the limited purpose of determining the median cost (of the demonstrator) under Regulation 1669.5 (c)(2), the factory holdback allowance must be included in the "net dealer price." 11/30/90.

215.0080 **Company Car Inventory.** When a dealer transfers a car from its new car inventory to its company car inventory, the presumption is that the car is used for purposes other than, or in addition to, demonstration, and the dealer will owe use tax at time of transfer.

This presumption is rebuttable however, if, in fact, separate records are kept as to the vehicle and proper affidavit made that car has been used solely for demonstration purposes. 3/3/53.

215.0100 **Driving.** When a vehicle is driven from the factory to the dealer's place of business, use tax is not applicable if there is no other use except demonstration or display while holding the car for sale. 6/5/50.

215.0325 **Lessors—Fair Rental Value.** Since the definition of sale in section 6006 includes both the passage of title to tangible personal property and, generally, any lease of tangible personal property, lessors of automobiles are entitled to use the "fair rental value" schedule in Regulation 1669.5 to the same extent as automobile dealers. 9/15/75.

215.0400 **New Vehicles.** The following uses of new vehicles by dealers are held to constitute demonstration or display:

(1) Short term loan of passenger vehicles to prominent personalities while visiting California, when the loan is for the purpose of drawing attention to the vehicle.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

(2) Assigning of vehicles to race tracks for display and use as an official car or pass car, when for the purpose of drawing attention to the vehicle.

(3) Assigning of cars to automotive editors of newspapers and magazines for purpose of writing articles about the cars.

(4) Assignment of cars to various divisions of the manufacturing corporation for demonstration to employees.

The following uses are not within the meaning of demonstration or display:

(1) Assigning cars to recent purchasers of new cars for use while the cars they own are being repaired.

(2) Assigning of cars to motion picture and television studios for personal use of personnel of studios in addition to use in pictures.

(3) Assigning of cars to ski lodges for transportation of skiers.

(4) Assigning cars to professional and college sports teams used for transportation purposes. 8/23/66.

215.0401 **New Vehicles.** An importer and distributor of new automobiles purchases automobiles from the manufacturer for resale to independent new car dealers in the United States. The distributor makes no retail sales. In an effort to promote market awareness of the automobile it imports, the distributor will make demonstrator automobiles available for test drives by potential customers at their home or place of business. Several of these demonstrator automobiles will be temporarily based in California at the office of an independent company who will be responsible for coordinating the test drives by potential retail customers. All retail sales inquiries resulting from the test drives will be referred to a local independent dealership since the distributor makes no retail sales. These vehicles will be used for limited mileage (between 5,000 to 8,000 miles) and will be subsequently wholesaled by the distributor to automobile dealers. Cars generally will not be used in test drive programs for greater than six months. At all times, these cars will be available for sale, at the specific request of authorized dealers, while being used as demonstrator vehicles.

When a purchaser purchases tangible personal property for resale and uses the property solely for demonstration or display while holding it for sale in the regular course of business, the purchaser is not required to pay tax on such use (Regulation 1669.5(a)). Under the facts stated above, the distributor is using the vehicles only for demonstration and display. Accordingly, if no other use is made of the vehicles purchased for resale by the distributor, no tax applies to its use of the vehicles for demonstration and display. 4/3/96.

215.0430 **Race Car.** When a distributor of a particular racing car enters a car in professional races in order to demonstrate its ability, the car is not being used solely for demonstration and display purposes. If the car is frequently demonstrated and displayed and only used partly for racing, use tax is due measured by the fair rental value of the car for the period of such use. If the car, which is raced, is not frequently demonstrated or displayed while being held for sale, tax applies measured on cost. 11/19/91.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

215.0440 **Racing.** Withdrawal of an automobile or boat from stock for the purpose of entry in an amateur race to demonstrate capabilities is nontaxable demonstration and display. Entry in a race for any purpose other than demonstration of capabilities, thus aiding the ultimate sale, cannot be regarded as a nontaxable use. 8/22/58.

215.0460 **Racing.** Where a sports car dealer obtained a car under a resale certificate and employed it extensively in both amateur and professional racing, there was a taxable use beyond the meaning of ''demonstration or display'' as contained in Section 6094. 8/17/64.

215.0470 **Registration of Demonstrator Automobiles With DMV.** The fact that an automobile dealer registers a demonstrator with DMV will not prevent the dealer from claiming that the vehicle is used for demonstration and display, with tax due on fair rental value for other use. The burden of proof, however, remains on the dealer. 3/18/75.

215.0510 **Service Stations, Automobiles Displayed at.** The sales tax applies to sales of automobiles to service stations which display the vehicles as inducement to buy gasoline, and are either given away or sold by the station operator. Such a use of the vehicle does not fall within the ''demonstration or display'' language of Section 6094, so that tax is due from the station operator who purchases the vehicles under a resale certificate, measured by the cost of the vehicles to him, even though he subsequently sells the vehicles and pays tax on the sales price. 10/27/55.

215.0520 **Shuttling and Deadheading Leased Vehicles.** The shuttling and deadheading of leased vehicles by the lessor for purposes of placing the vehicles in the appropriate inventory location represents retention of property for purposes of sale and is not subject to use tax. 7/12/76.

215.0580 **Use of Vehicles.** A company that is a wholly owned subsidiary of a major car manufacturer is engaged in the business of performing contracts for the manufacture of military hardware of surveillance equipment including satellite vehicles. It is not directly involved in the manufacture of components for motor vehicles but does perform considerable research and development work which could lead to improvements in motor vehicle components. Certain vehicles are acquired for resale without payment of sales tax reimbursement or use tax and are registered with the cooperation of local dealers. The employees are allowed the use of these vehicles for personal purposes for the payment of a monthly amount equivalent to 1.37% of the vehicle cost. The company declares and pays use tax on these amounts and also pays for repairs and maintenance, insurance, and all taxes and licenses. The employees are required to return these vehicles after they are used for 10,000 miles and complete a product evaluation form. Under terms of the agreement, a vehicle can be sold without notice or consent of the employee. Actual resale is made through local dealers. The company believes that the use of the vehicles should be regarded as nontaxable demonstration and display in view of the product evaluation or that the vehicles were leased to the employees.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

Nontaxable demonstration and display are limited to activities performed while the purchaser is holding the property for sale in the regular course of business. In legal contemplation, the company did not purchase and hold the vehicles for sale in the regular course of business even though a resale was to be made of each vehicle after it was used for 10,000 miles. In addition, the company does not qualify for the alternative reporting authorized by Regulation 1669.5 since the method is limited to manufacturers, distributors, or dealers.

It is also concluded that the transactions are not bona fide lease agreements. The employees receive the limited right of use of the vehicles for a monthly amount that is only approximately one-third of the market rental rate. While the preparation of a simple evaluation sheet has some value, it is not measured in terms of money and does not account for the great disparity. The amount of the monthly payment is not negotiated but is dictated by the company. It is only available to certain employees. The property may be sold by the company without notice to the employee. Finally, the employee does not bear the ordinary expense relating to its use during the period it is driven as is currently required of a lessee. In substance, the possession and use were given to the employees primarily as a fringe benefit. Tax is due on cost. The company's purchase of these vehicles ''for resale'' is contrary to law and should be discontinued. 8/12/92.

(b) LOANS TO SCHOOLS, COLLEGES, AND VETERANS' INSTITUTIONS FOR EDUCATIONAL OR TRAINING PROGRAMS

215.0610 **Cars Loaned to Drivers Training School.** A distributor buys new cars from the manufacturer for resale to dealers. The distributor registers a number of these cars in its own name and loans them to a private advanced driving school. The school offers specialized instruction on high-performance driving that bridges that gap between high-school drivers' education classes and the real world emergencies. Students are admitted to the school free, but by invitation only. Most invitations are issued by the dealers of the cars in question who sponsor the classes.

Since the taxpayer in this case is a distributor, the controlling authority is subdivision (c)(2) of Regulation 1669.5. Under that provision, the tax may be measured by fair rental value when vehicles are loaned to employees or other persons for periods not exceeding 12 months for frequent demonstration and display. The term ''other persons'' means ''persons other than employees'' and is further described in the regulation to include ''TV studios, visiting dignitaries, etc.'' The driving school is an ''other person'' for purposes of the regulation.

Subdivision (c)(2) of Regulation 1669.5 expressly presumes that vehicles registered in the name of the distributor, as these vehicles are, are frequently demonstrated and displayed. Also, the evidence shows that the distributor's purpose in loaning vehicles to the school is to promote the sales of these makes of vehicles. Therefore, the tax on these vehicles may be measured by the 1/40th formula if the loan is measured for a period not exceeding 12 months. If the loan is for a period of 12 months or more, the measure of tax is the purchase price of the vehicle to the distributor. 1/3/96.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

215.0620 **Lessee, Loan by.** An automobile loaned to a school district by a lessee of the vehicle is not exempted from the use tax by Section 6404. The lessee cannot be regarded merely as a conduit or agent for the lessor. 3/23/65.

215.0635 **Loan of Vehicle to a School District.** To be regarded as exempt, the loan of a vehicle to a school district must be for an educational program conducted by the district.

The following uses qualify:

(1) Driver training for students or adults.

(2) Hauling livestock and feed for the school district's farmer education program or to fairs when the hauling is part of the school district's program to encourage student entrance into fairs and exhibitions.

(3) Student training in school automobile shops.

(4) Transportation of teachers, students and/or administrators to educational programs sponsored or given by the school district such as music, special exhibits, etc., if students also are being transported.

The following uses do not qualify:

(1) Transportation of teachers or school administrators on school business or transportation of special language teachers between schools.

(2) Use in connection with maintenance of school land or buildings.

In addition to the qualifying uses described above, if a loaned vehicle is used to travel to and from the home by an instructor or administrator charged with the responsibility for the vehicle, this incidental use would not disqualify the vehicle from exemption. 9/30/68.

215.0800 **Trucks Loaned to Schools.** A dealer loaning pickup trucks to a school which are used for hauling livestock to fairs, hauling hay and feed, and hauling trailers for this purpose, is making a taxable use of the equipment, rather than nontaxable demonstration or display. 9/15/66.

215.0860 **University Vehicle Program.** A university athletic department administers a ''courtesy vehicle program'' under which automobile dealerships furnish vehicles to athletic staff members in exchange for benefits such as program advertising, season tickets, premium parking, press box passes, membership in an athletic department support group, and travel with the football team. Such benefits have a value of $3,550 for an athletic year.

This exchange of vehicles for benefits, although denominated as a ''courtesy vehicle program'', constitutes leases of vehicles and is taxable as such. The exchanges involve the temporary transfer of possession and use of the vehicles for a consideration, and thus qualify as ''lease'' transactions under Revenue and Taxation Code Section 6006.3 and as ''sale'' and ''purchase'' transactions under Revenue and Taxation Code Sections 6006 and 6010 since the vehicles are leased from resale inventory.

DEMONSTRATION, DISPLAY, ETC. (Contd.)

With respect to any one dealership, the measure of tax with respect to leased vehicles is $3,550 per athletic year. Those dealers who report tax on a quarterly basis should include in their measure of tax $887.50 per quarter with respect to vehicles leased during the quarter. 8/24/87.

DENTISTS AND DENTAL LABORATORIES
See Miscellaneous Service Enterprises; Prescription Medicines.

DEPOSITS
See Collection of Tax by Board.

DESIGNERS
See Advertising Agencies, Commercial Artists and Designers.

DISCOUNTS
See Gross Receipts; Gifts, Marketing Aids, Premiums and Prizes.

DISPLAY
See Demonstration, Display and Accommodation Loans of Property Held for Resale; "Tax-Paid Purchases Resold".

DISPLAY MATERIAL
See Gifts, Marketing Aids, Premiums and Prizes.

DISSOLUTION
See Occasional Sales—Sale of a Business—Business Reorganization.

"DRIVE-INS"
See Taxable Sales of Food Products.

DRUG AND DRUGGISTS
See Prescription Medicines.

DRY ICE
See Packers, Loaders, and Shippers.

DYERS
See Fur Dressers and Dyers; Fur Repairers, Alterers and Remodelers.

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ELECTRICAL TRANSCRIPTIONS
See Sound Recording.

ELECTRICITY
See Gas, Electricity and Water

220.0000 "ENGAGED IN BUSINESS"

220.0002 **Accepting Returned Products on Behalf of Out-of-State Retailer.** Company B is an out-of-state retailer located solely outside California. It sells products through its website with all orders processed out of state. The products are shipped directly to the customers from the retailer's out-of-state warehouse. Customers may return unwanted merchandise previously ordered from the out-of-state retailer to Company A's in-state stores. Company A then returns the products to Company B's out-of-state warehouse. Company B will issue a credit or refund to the customer and will compensate Company A for its services on its behalf.

Company A is acting as Company B's representative in this state for acceptance of returns of items sold. The ability of Company B's customers to return unwanted items to local stores of Company A on Company B's behalf as an alternative to packing them up and shipping them back to Company B is sufficient to bring Company B within the definition of retailer engaged in business in this state. 6/22/99. (2000–1).

220.0008 **Agent Operating In State.** A person selling income tax software packages ships all products from outside California by common carrier or postal service. Although there are no employees, inventory or other assets in California, the person pays commission to a California firm that provides telephone responses regarding California sales. Orders are solicited by direct mail. The California firm, which provide telephone responses, is a California representative (agent) primarily during the income tax season. The agent answers basic questions about the software but any involved technical questions are answered by the home office. All sales orders are mailed to the out-of-state house office.

Sufficient information was received to conclude the person was a retailer engaged in business in California under Section 6203 (b). The person clearly has an agent in California for the purpose of selling tangible personal property. The agent provides information to potential customers with the goal of selling tangible personal property to those potential customers. There can be no doubt that the agents are operating under the authority of the person for the purpose of selling tangible personal property since the agents are only compensated if a sale is made. 7/9/92.

220.0009 **Agent for Non-Registered Out-of-State Sellers.** Unregistered out-of-state chemical companies and distributors contracted with a California manufacturer to produce products under each chemical company's own private label. The out-of-state companies made arrangements with carriers to pick up the

products from the manufacturer's plant and deliver them to their consumer customers, located in California. The bills of lading indicate that the carrier received the products from the out-of-state retailer at the manufacturer's plant.

Under this scenario, the out-of-state chemical companies are using the manufacturer as an agent/representative and a place of business/distribution, for the purpose of distributing and delivering products to California consumers. Thus, the out-of-state companies that regularly used the manufacturer in this way are engaged in business in California and their sales to consumers are subject to the sales tax. The manufacturer would not be deemed to be the retailer under 6007 for those unregistered out-of-state companies who do this on a regular basis. 10/16/90.

220.0009.500 **Agent of Out-of-State Supplier.** A recreation design and risk management company, as part of its services, recommends and estimates the cost of playground equipment which is sold by an out-of-state supplier. The supplier quotes the final price, bills, and collects for the equipment. The design and risk management company is paid a commission by the out-of-state seller. The recreation design and risk management company is a representative of the out-of-state seller. The out-of-state firm is "engaged in business" in California and is required to collect the use tax. 3/28/88.

220.0010 **Agent to Receive Orders.** A corporation selling tangible personal property to California consumers by means of television advertisings on stations in California which list an "800" telephone number and a box number at the television station for receipt of orders is required to collect and pay over California use tax on sales to California customers. The television stations became representatives or agents authorized by the corporation to take orders. 7/6/77.

220.0015 **Attendance at Conferences and Occasional Sales Activity.** A business is engaged in making mail order sales from a location outside the state. It maintains no offices or warehouses in California. Representatives sometimes attend workshops and conferences in California. While at these workshops and conferences, the representatives present exhibits of products sold by the business. The general policy is not to make sales, but at times an order is taken and sent out of state for processing. In addition, an employee makes calls on California customers.

Both of these activities establish nexus for the purpose of requiring the business to collect use tax from its California customers. 11/14/94. 5/9/01. (Am. 2002–1)

Note: Subdivision (e) was added to Revenue and Taxation Code section 6203, operative April 1, 1998 and further amended operative January 1, 2001, to add an exception from the definition of "retailer engaged in business" for specified trade show activities.

220.0020 **Authority of Representative.** For a representative to be considered as operating "under the authority of" an out-of-state retailer, it is not necessary that

the retailer supervise or control the details of the work of the representative. The phrase "under the authority of" in Section 6203(b) refers to any relationship pursuant to which any power whatsoever is delegated by the out-of-state retailer to his California representative. 8/29/58.

220.0024 **Banking Activity in California.** An Arizona corporation has no physical presence in California, either directly or indirectly (such as through an agent or representative), and it transacts all its business in California, including banking, by mail, common carrier, or telephone. Section 6203(f) [now 6203(c)(4)] defines "retailer engaged in business in this state" to include a person benefiting from banking activities in California. However, this subdivision is not presently operative because it requires Congress to pass enabling legislation, and Congress has not yet done so. Thus, under current law, the Arizona corporation's banking in this state would not alone bring it within the definition of a retailer engaged in business in this state. 11/12/96. (Am. 2001–3).

(Note: Revenue and Taxation Code section 6203 was amended effective January 1, 2000. Reader should note changes to the subdivision indicated above.

220.0030 **Book Sales by Out-of-State Publisher.** A company is engaged in selling books and printed materials by direct mail solicitation and also through arrangements with school teachers in California. The company sends promotional material through the mail to teachers to pass out to their students. The students take the materials home and together with their parents, select the books they wish to purchase. The students bring the order forms and payment to the classroom where the teacher consolidates the orders and sends the orders and payment to the company. The company ships the books to the teachers who distribute the books to the students.

The teachers represent the company to the students and participate in making the sales. The teachers operate under the company's authority in that they are authorized to take orders, collect payment, and make deliveries of the merchandise. The use of school organizations to perform the identical activities were regarded as the establishment of an agency relationship in *Scholastic Book Clubs, Inc.* v. *State Board of Equalization,* 207 Cal.App.3d 734. There is ample basis for finding that the teachers are the company's agents and that the company is engaged in business in this state. By being engaged in business in this state, the company is required to collect the use tax on all sales to California customers. 11/19/92.

220.0033 **Bourse Table.** The dealer's participation in a convention in California is not the basis for regarding the dealer as engaged in business in California, but rather the dealer's selling activities in this state. Thus, if a dealer participates in the educational offerings of a convention, seminars, and symposiums, that participation alone would not be a basis for regarding the dealer as engaged in business in this state. Furthermore, even if the dealer makes purchases of tangible personal property at the convention, that activity would not be a basis for regarding the dealer as engaged in business in this state. If, however, the dealer engages in selling activities in this state, e.g., by obtaining a bourse table for

purposes related to selling tangible personal property, it will be regarded as engaged in business in this state within the meaning of section 6203. When such is the case, the dealer must register for collection of use tax and must collect that use tax with respect to all its retail sales into California, not just the ones related to its selling activities in California. 2/27/95; 7/14/95.

(Refer to section 6203 for limited exceptions for trade show participation.) (Am. 2000-3).

220.0040 **Business Office Maintained for Counseling Purposes.** An out-of-state company makes sales in California and maintains a business office in San Francisco for two directors who perform a public service counseling public officials and others. The directors do not solicit orders or render services in connection with the sale of the company's products. The company is a retailer engaged in business in California and is required to collect use tax on its sales to California consumers because it has a business office here. 2/6/70. (Am. M99–1).

220.0047 **Catalogs Distributed in California by Related Corporation.** An out-of-state operation engages in mail order sales to employees of its parent corporation. The parent corporation maintains facilities in California and distributes catalogs to its employees via inter-office mail. All orders and payments are sent by individual employees to the out-of-state subsidiary and the subsidiary sends all merchandise to the individual purchasers via United States mail or a common carrier. The parent corporation acts as an agent of the subsidiary when distributing the catalogs. The catalogs are for the purpose of facilitating sales, and the parent is therefore an agent of the subsidiary for the purpose of section 6203. The subsidiary is therefore engaged in business in this state because it has an agent in this state for the purpose of selling tangible personal property. 11/6/79.

220.0052 **Consulting Services.** A retailer of communication systems provides consulting services via telephone from the retailer's out-of-state location. This service is usually to customers for whom the retailer has previously developed a database of the customer's current equipment inventory. When a customer becomes interested in upgrading its system, the retailer can use the database to make specific recommendations. The retailer's employees do not travel to actively solicit business in the locations where the consulting services are provided. However, on occasion, it may be necessary for the retailer's representative to visit the customer's business location for initial assistance in gathering information for the database. Such visits occur on an exception basis.

If the only physical presence that the retailer has in California is the rare visit by a retailer's representative for the sole purpose of providing initial assistance in gathering information for a database, which would be used, if ever, not for promoting the sale of tangible personal property in California, but solely for use in providing future consulting services, such physical presence would not be a sufficient presence to meet the definition of "engaged in business in this state."

On the other hand, if the retailer uses the database to assist it in making sales of tangible personal property, or if the representative in California solicits sales of

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tangible personal property, even if ancillary to a primary purpose of gathering information for the database, the retailer would be regarded as engaged in business in this state under section 6203. 12/5/94.

220.0055 **Customer Billings Sold and Mailed Outside State.** A California retailer (taxpayer), a printing and manufacturing broker of recycled paper, has a contract to manufacture and print the phone bill invoices and the envelopes in which the phone bills are mailed to the phone company's customers.

The paper that the taxpayer purchases is shipped from a mill in Canada to a location outside California where a company manufactures and prints the phone bill invoices and the envelopes. After the phone bill invoices and envelopes are manufactured, they are delivered to a data-processing vendor's facility located outside of California. The data processing vendor is directly hired by the phone company. It is responsible for laser-printing the individual phone bills that list the actual calls made during a given month, stuffing the phone bills into envelopes, and mailing them. The phone company has customers in all 50 states, so a portion of the bills are mailed to California customers from an out-of-state location.

Since the retail sale of the paper and the printing occurs outside of California, the sale is not subject to the sales tax. Also, the phone company is regarded as the consumer of bills and invoices sent to its customers to reflect the company's monthly charges. Thus, since the phone company's vendor inserts the bills into envelopes and mails them to California customers from a location outside this state, the phone company's use has occurred outside California. Therefore, the phone company is not regarded as purchasing the bills or envelopes for use in California and the taxpayer is not required to collect the use tax from the telephone company. 8/12/94.

220.0060 **Delivery by Out-of-State Retailer.** An out-of-state retailer is "engaged in business in this state" under Section 6203 and therefore required to collect use tax if he makes substantial number of deliveries by his own truck to points in California. If the driver also makes collections, jurisdiction may be sustained on a lesser number of deliveries as long as the deliveries are frequent enough to be considered regularly made. 10/16/57.

220.0073 **Trade Shows.** An out-of-state taxpayer who is in the business of selling software holds five or six trade shows, each generally lasting from one-half to two days, in California per year. The purpose of the trade shows is to demonstrate the products it sells. The taxpayer does not enter into actual contracts for sale during the trade shows, nor does it take deposits for sales. The taxpayer solicits sales over the telephone from its out-of-state location. The taxpayer does no advertising in California nor does it solicit sales by catalog or flyers. The taxpayer does not have any resident employees, locations, or telephone listings in California. However, on rare occasions, a sales person may visit a potential customer within this state. No sale is ever consummated on such visits and orders are not approved within California. All products sold are sent directly to the purchaser by common carrier or mail from outside California.

"ENGAGED IN BUSINESS" (Contd.)

In this case, the taxpayer is entering the state in order to make sales. The fact that the taxpayer refuses to accept orders for software is irrelevant. It is holding the trade shows for the specific purpose of making sales of tangible personal property. That is, it is entering California for the purpose of selling. It is a retailer engaged in business in this state within the meaning of section 6203. It also appears that the taxpayer's sales person entering this state to "visit" potential customers is intended to maintain or enlarge its market in California. These visits are an additional basis for regarding the taxpayer as engaged in business in California. 3/22/96. 5/9/01. (Am. 2002–1) (Am. 2002–2).

Note: Subdivision (e) was added to Revenue and Taxation Code section 6203, operative April 1, 1998 and further amended operative January 1, 2001, to add a limited exception from the definition "retailer engaged in business" for specified trade show activities.

220.0080 **Delivery to Carrier in State.** The presence of an out-of-state seller's employees in California for the purpose of making deliveries to California customers, or to other carriers in California for ultimate delivery to California customers is sufficient to require the seller to collect use tax under Section 6203(b). It is not necessary in order to invoke tax liability, that the seller deliver the goods directly to the customer. 1/19/67.

220.0083 **Demonstration.** An out-of-state retailer with a truck used to haul and demonstrate its equipment in California, is considered having a representative in California for the purpose of selling equipment. As provided in section 6203(b), the out-of-state retailer is considered "engaged in business" in California and must collect the applicable use tax from its customers. 12/22/94.

220.0084 **Demonstrator Units.** A taxpayer advertises in trade and business journals. Its only place of business is outside of California. If a California firm contacts the taxpayer, an out-of-state based salesperson visits the California firm together with a demonstrator unit for the customer's evaluation. Upon completion of the evaluation period, the customer may order units which are installed on the customer's vehicle at the out-of-state business location for return to California.

The firm is "engaged in business" in California and is required to collect the use tax. 8/9/73.

220.0085 **Direct Marketer—Nexus With California.** An out-of-state direct marketer inquired whether it had created sufficient nexus with California to require that it collect use tax on sales shipped to California consumers through the following actions:

(1) Doing business with a California based "list broker". (There are no other connections with the broker and business is done through the mail and on the telephone.)

(2) The list broker obtains a "computer tape listing prospective" from a list owner.

(3) The list is sent to a California computer service bureau.

(4) The computer service bureau combines this list with others received from the direct marketer, creates mailing labels and ships the mailing labels to Chicago.

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(5) The direct marketer, through its agent in Illinois, attaches the labels to its catalogs and mails them throughout the country, including California.

The direct marketer has not created sufficient nexus with California to be considered a ''retailer engaged in business in this state''. (Revenue and Taxation Code Section 6203 (b).) None of the above listed actions include any representative, agent, salesperson, etc., operating in California under the authority of the direct marketer. 4/16/93.

220.0090 **Distribution of Notepads to College Students.** An out-of-state retailer is to be retained by certain businesses to produce special order notepads. These pads will bear the name of a participating college and the name of the sponsoring business. The pads will be distributed in bulk to the participating college for distribution to its students as part of the school's registration package. The bulk pads will be delivered to the colleges by common carrier. Each pad sponsor will pay to the out-of-state retailer a price for each pad plus a distribution royalty which is also based on a per pad price. The distribution royalty will then be forwarded by the out-of-state retailer to the colleges.

Since the out-of-state retailer pays the colleges a distribution royalty for delivering the notepads to the students, the colleges act as agents operating in this state under authority of the out-of-state retailer. Therefore, the out-of-state retailer is ''engaged in business in this state'' and is required to collect use tax from the sponsors measured by the sales price of the note pads delivered in California. 12/20/89.

220.0093 **Drop Shipment From Outside the State.** A taxpayer offers goods for sale through electronic terminals located in California. Purchases are made by customers who view the products on the terminals and pay by means of credit cards which are inserted into the terminals. The taxpayer pays California sales tax on such sales through terminals located in California unless the delivery address specified is outside California.

The taxpayer may ship the goods directly or, if the item is not in stock, the taxpayer will direct its out-of-state supplier to ship the goods directly. Some of the taxpayer's suppliers make sales on their own behalf by mail order. They have no other contact with this state. Sales through the electronic terminals by the taxpayer do not create sufficient nexus as to allow the Board to require the out-of-state mail order vendors to collect use tax on their own mail order sales to California consumers. 11/18/83.

220.0093.775 **Employees Entering California to Install Property Sold.** An out-of-state firm maintains a single business facility outside California where it designs and fabricates art creations and displays for use in conventions, promotions, and other public displays. The firm's sales of goods to its California customers occur outside this state. Occasionally, the firm sends its employees to California to set up or install the visual displays it sells. On one occasion, the firm's employees were present in California for a one week period in order to install a large display.

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Since the firm sends employees into California to set up or install visual displays for its customers, its physical presence in California makes the firm a retailer engaged in business inside this state pursuant to section 6203(b). Therefore, the taxpayer is required to register with the Board and collect use tax on its sales of property to its customers for use inside this state. 6/19/96.

220.0093.900 **Engaged In Business.** A nonprofit organization located out of state, among other things, has relatively insubstantial mail order sales of products such as science books and posters, and also leases its mailing lists. All sales and leases are handled by its out-of-state office. Some customers are located in California.

The organization has hired a California professor as a part-time editor of its exempt periodical journal. The editor performs no editing activities in California, but does perform other services for the organization in California, such as correspondence and telephone calls from his faculty office. In appreciation for the availability of the editor's office space, and for an assistant who is a university employee, the organization makes a non negotiated payment to the university which payment is not directly related to the value of the university's resources used by the organization. In addition, the organization has a western division (Division) which includes California and has no official designated office and no employees in California. The only persons regularly performing services for the Division are two employees of a California nonprofit organization who have been authorized to spend about one-half of their time on Division activities, and to use their regular place and facilities. The organization pays the California nonprofit organization one-half of the salaries of the two employees. There is no payment made for office space. However, the Division pays $600 per year as a goodwill gesture, and, also pays for postage and one telephone line. The Division does own some office equipment located in the building. The Division activities consist primarily of arranging annual meetings, printing a newsletter, and publishing books based on symposia presented at its annual meetings. The California nonprofit organization finances the publications, handles the sales, collects sales taxes, and remits net receipts to the Division. Neither the editor nor the Division has any role in the sales of the organization's products or the leases of its mailing lists.

The organization is engaged in business in California within the meaning of section 6203 (a), by reason of its Division's activities and its editor's activities in this state. The Division operates as the publisher of books, publishes a newsletter, organizes meetings, and handles telephone calls and related correspondence. Likewise, the editor uses his university office for correspondence and telephone calls related to the publication of the organization's journal. The Division's employees and the editor use those offices for organization activities with the approval and support of the California nonprofit organization and the university, and those individuals are compensated for their organization-related activities by the organization.

With respect to mailing list, section 6203(c) makes any lessor of tangible personal property leased in California a retailer engaged in business in this state

for purposes of collecting use tax from its lessees. Thus, if the mailing list is provided to a lessee in a taxable manner, i.e., on magnetic tape or similar devices, the rentals are taxable and the organization is required to collect the use tax from its lessees (Regulation 1504). However, even if the organization's rentals of the mailing list are taxable, this fact by itself would not have made the organization liable for use tax collection on its sales of other tangible personal property to California customers. It must have activities described above to be required to collect the use tax on such sales. 11/26/85.

(Note subsequent statutory change re application of tax to mailing lists)

220.0094 **Engaged in Business—Out-of-State Dealer of Coins.** An out-of-state retailer of rare coins who has no location, representative, or inventory in this state, is not regarded as "engaged in business" merely because the dealer may attend one or more trade conventions in this state, for the purpose of purchasing rare coins, as long as the dealer does not promote or solicit sales at the convention. This is the case even if the dealer makes subsequent mail order sales, solicited through trade publications, to someone who had coincidentally attended the same convention as the retailer.

If the dealer participates in selling at the conventions, the dealer would be doing business in California. As such, the dealer would be required to pay sales tax on sales made at the conventions. The dealer would also be required to collect and pay the use tax on sales made to California consumers, from outside this state, regardless of whether those purchasers attended the show. 12/8/94.

220.0095 **Engaged in Business—Trade Shows.** A firm's employees attended a trade show at least twice a year for four consecutive years. In addition, out-of-state dealers of its products regularly solicited sales in California with the sales order issued in the firm's name rather than the dealer's.

The firm does not have an office, warehouse or other place of business in California. During the four-year period, it sold 157 items for a total selling price of $211,184 from sales made at trade shows or solicited by the dealers. In addition, fifty to sixty percent of its sales into California were by telephone orders as the result of an advertisement in trade magazines.

The firm has sufficient nexus to require collection of tax on not only the sales at trade shows and by dealers, but also the mail order sales. 4/25/95. 5/9/01. (Am. 2002–1)

Note: Subdivision (e) was added to Revenue and Taxation Code section 6203, effective April 1, 1998, and further amended operative January 1, 2001, to add an exception from the definition of "retailer engaged in business" for specified trade show activities.

220.0100 **Franchise Dealer Designated as Independent Contractor.** An out-of-state supplier of magazines and encyclopedias entered into franchise dealer agreements with individuals in this state, pursuant to which the individuals (designated in the contract as independent contractors) were authorized to solicit combination installment sales of magazines and encyclopedias. Purchase orders were sent to the out-of-state supplier for acceptance and approval. The magazines

and encyclopedias were drop shipped to the customers in this state. Periodically, the supplier would obtain mail orders directly from the customers for yearbooks.

Since the franchise dealers were representatives of the out-of-state supplier operating in this state under the authority of the out-of-state supplier for the purpose of selling or taking orders for encyclopedias, the out-of-state supplier was "engaged in business in this state" and was required to register and collect the use tax with respect to encyclopedias and yearbooks sold to customers in California, notwithstanding the fact that the franchise dealers were independent contractors. 11/30/64.

220.0112 **Independent Contractor Transmitting Order.** A retailer is engaged in business in this state when it has an independent contractor who resides in this state and transmits orders and other information to the retailer's head office. These transmittals apparently resulted in the delivery of merchandise for storage, use, or consumption in this state. While the independent contractor may not have had express authority to solicit sales in California, he nevertheless engaged in business activities on the retailer's behalf which generated gross receipts and/or perpetuated an ongoing business relationship from which gross receipts were derived. 9/7/90.

220.0117 **Independent Dealers.** An out-of-state firm sells its merchandise to California consumers through its mail-order division which is also located outside of California. Orders for purchases are by telephone at its out-of-state location and goods are shipped to consumers by U.P.S. The firm, including its mail-order division, has no continuous or regular physical presence in California. If a product sold by the firm requires repair which is covered by warranty, the work is performed at its out-of-state location, except for products whose manufacturer is responsible for the warranty repairs. Repairs not covered by warranty are offered by authorized California dealers of the merchandise and the firm is not involved in such repairs.

California customers can also purchase the firm's merchandise from authorized California dealers. The firm has a distribution network of wholesale distributors to whom it sells merchandise. Those wholesale distributors in turn sell the merchandise to authorized independent dealers. The dealers carry the firm's brands as well as those of competitors. The firm has no direct contact with or any ownership interest in the dealers.

From the facts presented, the dealers are retailers who sell the firm's merchandise on their own behalf and not for the firm. Also, there is no indication that the dealers, or anyone else in California, acts as the firm's agent or representative for the purpose of selling, delivering, installing, assembling, or taking orders for any merchandise. Therefore, the firm is not engaged in business in California and thus is not liable to collect use tax on its mail order sales of merchandise in California. 6/10/94.

220.0119 **Independent Representative.** An out-of-state retailer has no office or property in California. The retailer's only contact with customers in California is through an independent representative who also is a representative for other

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companies. The representative calls on customers and forwards all orders to the out-of-state retailer. Upon completion of the work, the product is shipped via common carrier FOB shipping point to the California customer.

The phrase "under the authority of" in section 6203(b) refers to any relationship pursuant to which any power whatsoever is delegated by an out-of-state retailer to its California representative. Therefore, the out-of-state retailer is engaged in business in this state because it has a sales representative who is physically located in California and that person solicits sales of tangible personal property under power delegated to that person by the out-of-state retailer. As such, the out-of-state retailer must collect the applicable use tax from all of its California customers and pay that tax to this state, without regard to whether the purchase is made through the California solicitor, or entirely by mail or telephone. 11/2/95.

220.0120 **Independent Subscription Agencies.** An out-of-state publishing firm is considered as engaging in business in California under Section 6203 when the solicitation and acceptance of orders for directories and periodicals which are nonexempt property are taken by independent subscription agencies located in this state. The solicitation of orders by the subscription agency, which utilizes sample or descriptive advertising materials as a means of obtaining an order, provides the minimum contact necessary to impose the duty of collecting the use tax from the purchaser, user, or consumer, even though the publications are purchased in interstate commerce. 4/11/69.

220.0125 **Internet Nexus.** An out-of-state retailer engages in selling tangible personal property in California through its Internet web sites. The retailer's parent corporation operates retail locations in this State. Signs are posted inside the retail stores informing customers that they may purchase gift cards that can be used either online (via the out-of-state retailer's web address) or at the named retail stores. The signs also indicate that customers can obtain discounts on their online orders when they shop with a gift card.

By selling gift cards that can be used to purchase tangible personal property at the out-of-state retailer's Internet web site, the in-state parent is acting as the out-of-state retailer's representative and is engaged in selling activities on the out-of-state retailer's behalf for purposes of Revenue and Taxation Code section 6203 (c)(2). Accordingly, the out-of-state retailer is engaged in business in this state and must register to collect California's use tax. 12/21/00. (2001–3)

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220.0137 **Investing Through an Investment Manager.** The retaining of a California investment manager to manage the investment of cash of an out-of-state retailer does not result in classifying the out-of-state firm as "engaged in business in this state" within the meaning of section 6203. 4/19/93.

220.0140 **Lessors.** The purpose of the addition of subsection (c) to Section 6203 was to require the collection of the use tax by an out-of-state lessor on leases of tangible personal property in this state where the lessor did not otherwise qualify as "engaged in business in this state" under Section 6203(a) or (b). Where the lessor's connection with this state is solely that of leasing tangible personal property, he is responsible for collection of the use tax only with respect to leased property physically located in this state. The mere presence of the leased property in this state does not constitute the requisite nexus with respect to sales in interstate commerce, made by the out-of-state lessor to California customers. 1/21/69.

220.0160 **Local Advertising Solicitation.** A magazine publisher is not engaged in business in California within the meaning of Section 6203 when the only local activity is solicitation of advertising by an independent contractor who represents numerous clients. 8/26/64.

220.0160.350 **Lumber Broker.** A taxpayer who calls itself a lumber broker enters into the following types of transactions:

(1) The taxpayer purchases lumber from a California supplier and ships the product to a buyer within the State of California.

(2) The taxpayer purchases lumber from a supplier located outside the State of California, arranges to have the product shipped into California for minor improvements (e.g., having a third party pressure treat the lumber), and then arranges to have the improved product shipped to the customer located within California. Occasionally, the product may be in the state of California for more than 30 days while at the third party location for treatment before being shipped to the customer.

(3) The taxpayer purchases logs and lumber from surrounding states and has the product shipped directly to customers located within California.

(4) The taxpayer may hold product in the State of California which has been sold but cannot be accepted by the buyer immediately. The product may be held 30 days or longer.

In each situation, the taxpayer purchases the lumber. Therefore, although the taxpayer calls itself a broker who did not take title to the lumber, it was not a true broker and did, in fact, purchase and resell the lumber on its own account.

The application of tax depends on whether the taxpayer is regarded as engaged in business in California. If so, it must report the applicable sales or use tax on these transactions. The taxpayer will be regarded as engaged in business in this state if any person in California acts as its representative for purposes related to sales of tangible personal property. The facts indicate that the taxpayer may be in this state and would be required to pay sales tax on its sales in which its location

in this state participates, and to collect and remit use tax on its other sales; however, there is insufficient information to make this determination. If the taxpayer is not regarded as engaged in business in this state, then the California supplier in situation 1, the third party performing improvements in situation 2, and any suppliers in situation 3 who are themselves engaged in business in California would be regarded as making the retail sale under the second paragraph of section 6007. It also appears that there would be a person who would be classified as the retailer under section 6007 in situation 4; however, there is insufficient information to make this determination. 12/14/95. (Am. M99–1).

220.0161 **Mail Order Merchandise.** There are a number of merchandising programs which involve major oil companies, major airlines, and others who enter into agreements with direct mail order firms for the sale of merchandise to customers of the oil companies, etc. Under these programs, brochures and other sales literature promoting various products are mailed to the customers of the oil companies, etc., in an envelope with the customer's periodic credit card statement. Purchases of the advertised products can usually be charged to the customer's credit card. The merchandise is generally shipped to the purchaser by the mail order firm. The oil companies, etc., receive compensation based on the volume of sales generated.

It has been concluded that the oil companies, airlines, etc., should be held as the retailer provided that all of the literature and order forms lead the customer to believe that this is the party with whom they are contracting. If the literature identifies the mail order firm as the seller, that party must be held as the retailer.

In the latter situation, the oil companies, etc., will be considered the agent or solicitor of the mail order firm if the solicitation is from a California location, and the mail order firm will be considered to be engaged in business in California. On the other hand, if the solicitation by the oil companies, etc., is from a location outside California, there will be insufficient participation within this state, and the mail order firm will not be considered as engaged in business in California. The fact that the solicitor or agent may be engaged in business in this state on its own behalf is insufficient participation. Additionally, when a mail order firm contracts with two or more oil companies, etc., and it is disclosed as the seller, it can be held liable for collection of tax on all of its sales in California notwithstanding the fact that the sole solicitation in this state relates to only one of the parties with whom the mail order firm has contracted. 11/19/76; 7/10/96.

220.0162 **Maintaining An Inventory.** An out-of-state seller that has agreed to provide and maintain merchandise inventory at certain locations (of others) in California and that has representatives who make periodic calls at such locations to provide prominent point of sale display of some of the merchandise, is "engaged in business" in California. The seller is required to collect use tax on direct mail-order catalog sales to California consumers even though the activity creating the nexus may be unrelated to the mail-order sales. It is not necessary

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that the mail order sale be made as a result of local intrastate activities of the seller for that seller to be required to collect and remit the applicable use tax. 9/26/72. (Am. M98–3).

220.0163 **Marketing Representatives Visit California.** An out-of-state company has two manufacturing divisions that are also located out of state. One of the divisions sent marketing representatives within the State of California six times over a three-year period. The purpose of these visits was to meet both customers and non-customers of the division to conduct informal market surveys within California regarding the use of the division's products. The purpose of the survey questions was to identify customer needs that the division could better serve. No product orders were taken or filled by the marketing representatives during these visits. These trips averaged over a week and occurred once during the first half of each year and once during the last half of each year.

The activities of the representatives in California are clearly selling activities coming within section 6203(b). Making personal contact with customers to identify their needs with respect to the company's products is clearly a selling activity. Contacting non-customers regarding the retailer's products is also clearly a selling activity regardless how the contact is characterized. The physical presence in California related to maintaining or enhancing the retailer's market in California is the substantial nexus with California that supports the State's imposition of a use tax collection duty on the retailer. Accordingly, the out-of-state company is a retailer engaged in business in California within the meaning of section 6203(b) (including all of its divisions). 1/15/97. (Am. 2001–3).

220.0165 **Nexus Out-of-State Newspapers / Periodicals.** Under both California statutes and Supreme Court precedent, any newspaper or periodical publisher maintaining a news bureau in California has nexus in this state and would be obligated to collect use tax on its taxable sales. 7/19/91.

220.0170 **Orders Sent to Local Television Station.** Where an out-of-state seller advertises on a California television station and the advertisement provides for orders to be sent to the television station, the seller is required to collect use tax on sales to California customers even though the television station merely forwards the orders to the out-of-state seller. The television station is acting as an agent of the seller in this state in an effort to exploit the consumer market in California. 2/2/77.

220.0175 **Out of State Auctioneer.** A public auction is held in Kentucky for mining equipment located in several different states including California. The auctioneer is not "engaged in business" in California.

Since the auctioneer is not engaged in business in California, the owner's delivery of the equipment in California to a consumer or person for redelivery to a consumer, pursuant to the auctioneer's sale, is a retail sale in California by the owner. (Revenue and taxation Code Section 6007.) 1/3/90.

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220.0176 **Out-of-State Printer Voluntarily Registered to Collect Use Tax.** An out-of-state printer chose to voluntarily register with the Board as a retailer under section 6226. One of its clients has retail outlets in Oregon, Washington, and California. This client frequently requests that printed matter be shipped directly to each of its outlets. The printer wants to send a single bill to its client and have the client be responsible to self assess any California sales or use tax that may be owed.

Since the out-of-state printer chose to voluntarily register with the Board as a retailer, it is required to collect all use taxes due with respect to its sales to California consumers (Regulation 1684(b)). There is no requirement that each of the California outlets be separately invoiced for each job. Thus, the issuing of a single invoice to the client is sufficient. For purposes of establishing a record of the printer's sales for use in California, these invoices should identify the products sold for use in California as well as the corresponding calculations of the use tax on these products. 11/14/96.

220.0178 **Permits.** Company A and Company B form a partnership, Company C, for the purpose of manufacturing certain building components. C is not located in California, and A holds a California seller's permit. A is a selling agent for C. As long as A is C's selling agent, C is a retailer engaged in business in this state and must register with the Board. C is responsible for collecting use tax on retail sales in California and remitting the tax to the state. If, however, C is selling the property to A and A is reselling it on its own behalf, C would not be represented in this state and would not be required to register with the Board. A would be making sales and would be responsible for the payment of sales tax on the gross receipts from retail sales in this state. 3/31/94.

220.0180 **Promotional Mail Address and Agent Meeting Place.** A promotional mail address and an occasional meeting place for west coast agents constitutes an "office or premises regularly used by a retailer for the transaction of business." 8/6/52.

220.0190 **Post Office Box for Receipt of Orders.** An out-of-state photoprocessing company which distributes mailers in California and utilizes a California post office box for purposes of forwarding orders of its California customers is required to collect use tax due on the purchases made by California customers. 7/15/77.

220.0194 **Public Warehouse.** A firm plans to store tires in a public warehouse in California. It will make its sales solely by mail order.

If all sales of goods located in the California public warehouse were sales in interstate commerce, no tax would apply and a seller's permit would not be required. However, even if all sales from the California warehouse were exempt sales in interstate commerce, the operation of that warehouse in California makes the firm a retailer engaged in business in California. Thus, the firm is required to collect use tax on its sales to California consumers, even if the property was shipped from a warehouse outside California. 10/28/80.

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220.0197 **Publishing Company.** A publishing company headquartered out of state operates two divisions. Division A makes retail sales of training aids in California through sales people who live and work in California. Division B sells exempt periodicals and clothbound books based on topics appearing in the periodicals. All orders for these books are sent to New York from where they are filled and shipped to California (or other state) buyers by mail. The Division A sales people are not involved in the sale of Division B books, nor does Division B have any sales people, office, merchandise storage, or representative of any kind in California. Although operating as two divisions, the company is a single "person" for purposes of sales and use tax. Thus, the publishing company is required to collect and report use tax on the sales of Division B books to California consumers, even though the activity of Division A is what causes it to be "engaged in business" in this state. Once it is established that a seller is engaged in business in this state, the seller must collect and remit the applicable use tax for all its sales to California. 2/17/71. (Am. M98–3).

220.0200 **Registration Requirement.** The definition of "retailer engaged in business in this state" in Section 6203(a) is entirely independent of the definition contained in paragraph (b). Hence, an out-of-state retailer who maintains an office or other place of business in California is required to register with the board even though such office or other place of business is not maintained "for the purpose of selling, delivering, or the taking of orders." 8/26/64.

220.0220 **Representatives—Activity of.** Section 6203(b) [now subdivision (c)(2)] does not require that the activity of local representatives be related to retail sales, but merely that the retailer have a representative here "for the purpose of selling, delivering or the taking of orders for any tangible personal property." Accordingly, a retailer making mail-order sales to California consumers is required to register with the board and collect the use tax even though its only in-state activity is the solicitation of sales for resale. 10/26/64. (Am. 2002–2).

220.0221 **Mail Order Catalogs.** The taxpayer installs a number of mail order catalogs on the premises of public libraries with whom he has made arrangements, along with a supply of universal mail-order forms. Persons coming to the library may examine the catalogs, make a selection of merchandise desired, fill out an order form, and deposit it in a designated space in the library. The taxpayer processes the order form to the appropriate retailer and receives a 10% commission from the mail order firm.

Under this arrangement, each of the mail order firms whose catalogs are displayed in the library is a "retailer engaged in business in this state" pursuant to section 6203(b) because the taxpayer is a representative operating in this state for the purpose of taking orders for tangible personal property. The mail order firms are responsible for collecting use tax on all retail sales of tangible personal property to California customers even if the order did not originate from the taxpayer's catalog center. 12/2/85.

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220.0225 **Mail-Order Sales From Out of State.** An out-of-state retailer with sales representatives in California was a retailer engaged in business in this state and was required to collect use tax on its mail-order sales to California consumers, even though it did not engage in any local activity with respect to the mail-order sales. 10/20/70.

220.0232 **Manufacturer's Representatives.** There are two common relationships that a manufacturer's representative could have with the manufacturer. If the representative makes a retail sale of tangible personal property, the representative owes the sales tax, or is required to collect the use tax, even if the manufacturer ships the property, per the representative's directions. If the representative solicits orders in this state as an agent for the manufacturer, these services make the manufacturer "engaged in business" in this state, and requires the manufacturer to collect the applicable use tax and pay it to the state. 9/9/93.

220.0236 **Out-of-State Fund Raising Organization.** An out-of-state fund raising organization's use of California school children to solicit sales of magazines and records was sufficient to require it to register with the Board and collect use tax on the sales made by the children. Once the children commenced solicitation, they were acting as agents under the authority of the organization. 8/22/89.

220.0237 **Personam Jurisdiction.** If there is sufficient nexus to impose a collection responsibility on an out-of-state retailer, *personam jurisdiction* exists to allow the Board to enforce these laws and collect on the debts. 12/24/87.

220.0237.500 **Photographs Taken in State.** An out-of-state printer is not considered "engaged in business in this state" by merely hiring an unrelated photographer to take photographs in California and to then send the photographs to the printer outside of California. Likewise, if the printer shoots the photographs in California himself and does not perform any selling activities while in California, the printer is not considered "engaged in business in this state."

However, it would be unusual for a printer to visit a customer to take photographs and have no additional interaction or discussion which is related to the sale and purchase of the printed matter. If the printer or his representatives engages in any activities beyond photography which constitutes selling activities, such as soliciting sales, taking orders for sales, or making contracts for future sales, the printer will be considered engaged in business in California. 8/1/97. (M98–3).

220.0238 **Promotional Software Sent to Customers.** The retailer will send a promotional software listing of its products on a floppy diskette to its three largest customers in California. The retailer will retain title to the licensed software.

If the floppy diskettes are a mere substitute for the more traditional products catalog, the diskettes would not, in themselves, cause the retailer to be engaged in business in California within the meaning of section 6203. 12/5/94.

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220.0241 **Representative Accepting Payment In State.** Two foreign corporations, who are in the equipment rental business, are in the process of liquidating their business through an auction. This auction will be conducted live from an out-of-state location and will be transmitted simultaneously via satellite to various cities including one city in California. All of the property for sale is located outside of California. If a bidder in California is the high bidder, he will immediately pay the bid amount to a California representative of the seller. However, the bidder will be responsible for traveling to the out-of-state location to accept delivery of the property and to arrange transportation to the location of his desire.

The sale to the successful bidder in California will not be subject to sales tax because the sale transaction will not take place in California, but rather out of state upon delivery of the property to the purchaser. However, the seller is responsible for the collection of use tax. The seller is considered to be doing

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business in this state as set forth under section 6203(b), because of the presence of a representative for the purpose of accepting orders for purchase. The presence here is intended to enhance and facilitate sales.

Section 6247 provides that tangible personal property delivered outside California, to a purchaser known by the retailer to be a resident of this state, will be presumed to have been purchased for use in California. Since the bidders submit their successful bids in California, it would be self-evident that the sellers should be aware that some, if not most, of these purchasers are California residents. In those cases where the sellers know, or should be aware, that a purchaser is a California resident, the sellers will be responsible to collect the use tax unless they in good faith accept a statement from the purchaser to the effect that the property has been purchased for use outside California. 3/21/86.

220.0242 **Representatives Entering California to Solicit Sales Leads.** A manufacturer of computer software sells throughout the United States. The company is domiciled outside of California and does not maintain an office, assets, inventory or employees in California. The company attends trade shows occurring fewer than three times per year, in California where leads are identified. The company employs sales representatives who enter California twenty-five to thirty times per year to call upon specifically identified leads to solicit sales, meet with specific prospects, and to maintain relationships with existing customers.

This company is a retailer having substantial nexus with this state and is engaged in business in this state. 8/25/92.

220.0245 **Retailer's Trips to California.** An out-of-state company maintains a single business facility which is outside California. California customers mail or fax orders to the out-of-state location. The company ships its goods to the California customer via common carrier; these sales occur outside this state so that California sales tax does not apply. The company's employees travel to California to visit customers and check on product performance at customer plants once or twice a year on a regular basis. The purpose of these visits is to meet customer employees and to better understand customer's technical needs so the company can provide better service.

The company's activities inside this state relate to the sale of tangible personal property. The trips to California provide it with knowledge of anticipated customer needs through evaluation and customer performance. The trips also act to further establish its relationships with California customers and make possible the realization and continuance of valuable contractual relationships resulting in sales. These activities in California are therefore related to the sale of tangible personal property and make the company a retailer engaged in business inside this state within the meaning of section 6203(b). 2/9/96.

220.0248 **School Acting As Solicitor For Out-Of-State Retailer.** An out-of-state retailer makes arrangements through school principals to solicit orders for its merchandise from students. The school principal signs a form letter agreeing to participate in the program and to display the sample merchandise to be sold.

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Orders and payment for the merchandise are taken by the teachers and forwarded to the out-of-state retailer. Although the out-of-state retailer specifies suggested retail selling prices, the school can charge the students any price they want. The only relevant pricing requirement is that the school must remit the "wholesale price" to the out-of-state retailer. The out-of-state retailer packages the orders by homeroom for easy distribution by the teachers. For its participation in the program the school receives an award depending on the amount of sales generated.

Under this scenario, the school, through its principal and teachers, is acting as the agent for the out-of-state retailer for the purpose of making sales to California consumers. The out-of-state retailer is therefore engaged in business in California and required to collect the use tax from purchasers and remit it to the Board. 7/26/93.

220.0249 **Software Training Sessions.** An out-of-state firm with no employees, inventory, or assets in California has sold less than 10 packages of software. One of the packages was sold to a California firm. The sale was generated through contacts at a trade show or through referrals by sales representatives of other software vendors. All property was delivered by common carrier. As part of the sale, the company sends an employee to the customer's place of business to conduct a two-day seminar.

The training seminar is a clear and definite presence in this state related to a specific sale of tangible personal property. The company is engaged in business in California within the meaning of section 6203(b). Also, it appears that the activities of the firm's representatives in this state on its behalf may be an independent basis for regarding the firm as engaged in business in California within the meaning of section 6203(b). 12/15/95.

220.0250 **Subsidiary.** Parent Corporation is the sole shareholder of a subsidiary ("X") which consists of out-of-state department stores and a direct mail order operation ("A-B") with some California customers. The fact that Parent is also a manufacturer and wholesaler of paper products, sold by another subsidiary (Marketing) which does business in California does not mean that "X" is a "retailer engaged in business in this state," as provided in Section 6203 in that neither Parent nor Marketing sold, delivered or took orders of tangible personal property on behalf of "X" or its direct mail order operation "A-B" and there are no inter-company transactions or inter-operational or financial involvements or relationships. Accordingly, "X" is not responsible for the collection of California use tax with respect to its catalog sales shipped by mail or common carrier to California purchasers. 10/23/78.

220.0253 **Support Services.** An out-of-state retailer sells component parts that are used in a variety of high technology industries. A representative of the retailer occasionally travels to California to provide on-site engineering support services for products purchased by the retailer's California customers. The representative does not take orders from customers while in California.

"ENGAGED IN BUSINESS" (Contd.)

A person does not have to accept actual orders to be regarded as present in California "for the purpose of selling." The representative's presence in California is directly related to the retailer's sales of products to California consumers and enables the retailer to maintain or expand the market for its product in this state. Accordingly, the retailer is regarded as engaged in business in California and must collect the applicable use tax from its California purchasers. 7/30/99. (2000–1).

220.0256 **Telecommuting In-State.** An out-of-state web-based retailer who is not engaged in business in California hires a website designer who telecommutes from his home in California. The designer is responsible for improving the quality of communication in the company's websites. The designer is responsible for graphic design, information design, interface design, usability testing and evaluation, documentation, special projects, teaching, consultation, and quality assurance. The designer does not have any contact or involvement with the retailer's customers and is not involved with the actual orders placed by customers.

Since the only business activities conducted at the designer's home are telecommuting activities included in his job description and no portion of the home is in anyway held out to be what could be called a business location of the out-of-state company, such as the placement of a sign out front or the holding of classes at the home, the out-of-state retailer would not be regarded as engaged in business in California. 6/21/99. (2000–1).

220.0260 **Telephone Service.** An out-of-state retailer who has orders taken by an "800" telephone number service located in California is a "retailer engaged in business in this state." The "800" telephone number service is a representative operating in this state under the authority of the retailer for the purpose of taking of orders as provided in Revenue and Taxation Code Section 6203(b). Accordingly, such out-of-state retailers will be required to register with the Board and collect and report use tax on sales of tangible personal property to consumers in California.

If an order for an out-of-state retailer is taken by an "800" telephone number service located in California and the property is sent from an out-of-state location to an in-state location, use tax will apply.

Retailers located in California will be required to report and pay either sales or use tax whenever a taxable sale is made to a California consumer for delivery in this state. If delivery is from within California to an out-of-state location, tax will not apply provided the property is shipped to the out-of-state location by facilities operated by the retailer or by delivery to a carrier, customs broker, or forwarding agent for shipment to such out-of-state location. This would be true whether or not the order was placed by an in-state or out-of-state consumer.

If the consumer is located out-of-state, the retailer is located out-of-state, and the property purchased is sent from the location of the out-of-state retailer to an out-of-state location, neither sales nor use tax will apply to the sale even though the order is placed through an "800" number located in California. 1/30/81.

"ENGAGED IN BUSINESS" (Contd.)

220.0270 **Trade Shows—Presence in This State for Purpose of Selling.** An out-of-state retailer attends one show a year in California in order to solicit orders for knives. When an order is taken, the retailer takes a down payment or payment in full or will bill the customer later. The knives in all cases are shipped to the buyer from a point outside California.

Since the retailer enters California for the express purpose of making retail sales, it is regarded as a retailer engaged in business in this state. The retailer is required to collect use tax. 2/10/95.

220.0280 **Training Course—Nexus With California.** A out-of-state company is engaged in the sale of prewritten software and software licenses. It maintains no offices or warehouses in California. The company executes its license agreements with its customers out of state. As a result of the license agreement, the company transfers tangible personal property for consideration in the form of computer disks to customers located in California. The customers use the software inside California by installing and running the programs on their computers. These customers owe use tax on the purchase price of the software they purchase.

Independent of the software sales, the company offers a 3½ day software training course which is taught one to three times a year in California. The course attendees do not need to have purchased software licenses from the company, and many have not. The purchase of the software license does not entitle one to attend the course, and, conversely, course attendance does not provide a software license. The software does not in itself require training. The company rents computers for use during the training course and provides the instructor, or facilities are provided by the company's customers who want to offer the training course.

The company's physical presence inside this state through its teaching of software classes is related to the sale of the very software for which the classes are offered. The company's activities inside this state create nexus with California and make it a retailer engaged in business inside this state. The company is engaged in business inside this state and is, therefore, required to collect use tax from its customers. 10/20/97. (M99–1).

ENGRAVING
See Producing, Fabricating and Processing Property Furnished by Consumers—General Rules; Printing and Related Arts.

EQUIPMENT
See Buildings and Other Property Affixed to Realty; Leases of Mobile Transportation Equipment; United States Contractors.

ESCROW SALES
See Sale.

EXCESS REIMBURSEMENT
See Reimbursement for Sales Tax.

"ENGAGED IN BUSINESS" (Contd.)

EXCHANGE
See Barter, Exchange, "Trade-ins".

EXCHANGE OF USED FOR RECONDITIONED GOODS
See Installing, Repairing, Reconditioning in General; Vehicle Engine Exchanges.

EXECUTORS
See Occasional Sales—Sale of a Business—Business Reorganization; Vehicles, Vessels, and Aircraft.

222.0000 EXEMPTION CERTIFICATES—Regulation 1667

(a) IN GENERAL

222.0010 **Computer Generated Signatures.** Exemption certificates signed by a computer generated signature of the buyer's authorized agent are acceptable. 9/28/87.

222.0016 **Form of Certificates.** Regulation 1667 does not require an exemption certificate to contain a statement that the purchaser acknowledges liability and responsibility for reporting tax in the event the property is used in some other manner. 6/2/89.

(b) EFFECT

222.0040 **Aircraft—Purchaser Liable for Sales Tax.** A purchaser of an aircraft gave an exemption certificate to a California aircraft dealer, alleging that he was a nonresident of California and that he would make no use of the aircraft here, other than the removal of it from the state. The purchaser owned real property in California, and Oregon and spent time in Oregon, California and Arizona. The purchaser filed California resident income tax returns, claimed a homeowners exemption on a residence located in California, and owned a vehicle licensed and registered in this state. The aircraft was flown to Oregon on the date of purchase and did not reenter California until it was put up for sale two years later.

Since the aircraft was delivered in California it is a sales tax transaction. The seller was relieved of the liability for the tax due to the purchaser's issuance of an exemption certificate. The purchaser is not entitled to the exemption provided by Regulation 1593 (a)(3), since he was a California resident at the time of purchase. As the result of issuing an erroneous certificate, the buyer is liable for the sales tax on the purchase price of the aircraft, pursuant to Regulation 1667 (b)(3). 5/23/93.

222.0500 **Good Faith.** A vendor is not regarded as having accepted an exemption certificate in good faith for its sales for a specific type of catheter when it is in possession of an opinion from the Board that the sales of its medical product are not protected from taxation by any statutory exemption. Therefore, such a certificate would not relieve the vendor from liability for sales tax on its sales. 5/31/94.

222.0510 **Good Faith Acceptance of Certificates.** Vendors are expected to exercise reasonable judgment with respect to accepting resale and exemption certificates in good faith. If the property sold is in the opinion of the vendor and

EXEMPTION CERTIFICATES (Contd.)

from the vendor's experience of a type that would ordinarily be consumed or used in a nonexempt manner, the vendor's good faith acceptance of a certificate may be questioned. 5/23/75.

222.0700 **Repealed Exemption.** An exemption certificate issued with respect to an exemption statute which previously had been repealed does not shield the seller from tax liability. 2/4/94.

222.0725 **Retroactive Effect.** A customer has requested a refund of sales tax from the taxpayer on purchases it made during the previous three year period. The taxpayer inquired whether the purchaser can file an exemption certificate retroactively for these purchases.

Exemption certificates may not be filed retroactively. That is, only an exemption certificate that the retailer takes timely and in good faith will serve to protect the retailer from tax liability. However, if the retailer files a timely claim for refund and establishes that the amounts were, in fact, overpaid to the state, the amounts would be refunded to the retailer provided the retailer refunded such amounts to its customer. 6/11/96.

EXPORT PACKERS
See Interstate and Foreign Commerce.

EXPORTS
See Interstate and Foreign Commerce.

225.0000 EYEGLASSES AND OTHER OPHTHALMIC MATERIALS—Regulation 1592

225.0040 **Contact Lenses.** Charges for fitting and training services included in the sale of a set of contact lenses are not subject to sales tax. 6/10/58.

225.0050 **Dispensing Opticians.** A dispensing optician who transfers eyeglasses to an optometrist or physician who in turn transfers the eyeglasses to his patients is not regarded as dispensing ophthalmic material within the meaning of Section 6018 of the Revenue and Taxation Code. Under such circumstances, he is regarded as the retailer rather than the consumer of the eyeglasses and other ophthalmic material he transfers. 1/12/77.

225.0060 **Hearing Aids.** Hearing aids installed in the frame of eyeglasses are not used in the treatment or correction of the human eye, and, accordingly an oculist or optometrist, who is not also a licensed hearing aid dispenser, is a retailer of such aids and not a consumer thereof. 5/16/55; 9/16/87.

EYEGLASSES, ETC. (Contd.)

225.0066 **Intraocular Molecular Lenses.** Intraocular molecular lenses are considered ophthalmic or ocular devices. As such, they are excluded from the definition of ''medicine'' under section 6369(c)(4) and sales or use tax would apply to their sales to physicians and surgeons and optometrists. 1/3/78.

225.0075 **Ophthalmic Materials Furnished Under Insurance.** Physicians, surgeons, optometrists, and dispensing opticians are the consumers of ophthalmic materials (eyeglasses, frames, lenses, etc.,) used in the performance of their professional services. Tax applies to the sale of such materials to them regardless of whether payment is made in whole or in part by an unrelated medical insurer. The medical insurer is not the consumer. 4/18/94.

225.0077 **Optical Devices.** In order for optical devices furnished by an optometrist to the patient to constitute ophthalmic materials under section 6018, the optical devices must be permanently attached to the carrier lens worn by the patient. An optometrist is the consumer of optical devices permanently attached to carrier lens worn by the patient which are furnished in the performance of the professional services in the diagnosis, treatment, or correction of conditions of the human eye. Therefore, the transfer of such devices to patients is not a retail sale under the Sales and Use Tax Law and tax does not apply to any of the optometrist's charges to the patients for such optical devices. Rather, tax applies with respect to the sale of such devices to the optometrist, (Regulation 1592).

In contrast, optical devices which are merely clipped on carrier lens do not qualify as ophthalmic materials under section 6018 since these devices are not permanently attached to the carrier lens worn by the patient. Similarly, optical devices such as hand held magnifiers, stand magnifiers, and close-circuit televisions do not qualify as ophthalmic materials under section 6018. Accordingly, an optometrist is the retailer of such optical devices to the patients and sales tax applies to the optometrist's gross receipts from such sales. 7/16/96.

225.0080 **Optometrist as Retailer.** An optometrist is a retailer of goggles, sunglasses, colored glasses or occupational eye-protective devices, frames and any other tangible personal property which is not ''consumed'' by the optometrist in performance of professional services in the diagnosis, treatment, or correction of conditions of the human eye. 12/23/65. (Am. 2002–2).

225.0086 **Pharmacies—Sale of Contact Lenses.** Registered pharmacies are the retailers of contact lenses rather than the consumer. Section 6018 does not include registered pharmacies as consumers of ophthalmic materials furnished in the treatment of human eye conditions. 2/21/96. (Am. 99–2).

(Note: See amendments to section 6018. Operative January 1, 1998, licensed pharmacists are consumers of replacement contact lenses.)

225.0090 **Prescription Spectacles Sold by Manufacturer.** A company is in the business of making industrial prescription safety spectacles which it sells directly to operators of industrial plants for use by their employees. While the prescription is obtained by the employees from their optometrists/doctors, the manufacturing company is not a licensed dispensing optical laboratory. Tax applies to sales of

prescription spectacles by anyone other than physicians, surgeons, optometrists or licensed dispensing opticians. The sales by the company are therefore taxable. 3/24/95.

225.0100 **Regrinding Ophthalmic Lenses.** Taxable fabrication labor includes the additional grinding of new lenses necessitated either by an error in the optometrist's prescription or by the patient's finding they are not correct after wearing them for a short period of time. If, however, a new prescription is necessitated after a considerable period of time because of a change of vision, a regrinding of the old lenses constitutes a modification, not a fabrication. The inserting of new lenses in the patient's old frames is non-taxable installation labor. 6/5/59.

225.0115 **Sales to the General Public.** Sales of ophthalmic materials to the general public by manufacturers of such materials are retail sales subject to tax on the full amount charged. Transfers to patients are exempt only when made by a licensed optometrist, physician and surgeon or a registered dispensing optician. 9/13/94.

225.0120 **Scope of Examination.** An optometrist who makes a substantial portion of the eye examination, resulting in the particular prescription filled, is the consumer of the materials, the same as when the entire examination is made by him. 6/24/52.

225.0130 **Thermal and Chemical Care Units.** When thermal care or chemical care units used to clean and sterilize contact lenses are furnished to patients by a physician and surgeon or optometrist as part of the purchase of contact lenses, the physician and surgeon or optometrist will be considered the consumer of the thermal and chemical care units. Tax applies when such units are sold to the physician and surgeon or optometrist. In all other instances, the physician and surgeon or optometrist is the retailer of such units and tax applies to the gross receipts from such retail sales. 1/21/81.

225.0131 **Thermal and Chemical Care Units.** When thermal and chemical care units are furnished to patients by a physician and surgeon or optometrist as part of the purchase of soft contact lenses furnished in conjunction with professional services, the physician and surgeon or optometrist will be considered the consumer of the thermal and chemical units and tax applies to the sale of the units to the physician and surgeon or optometrist.

When a registered dispensing optician or an optometrist fills a prescription for soft contact lenses prepared by a physician and surgeon or optometrist, and thermal care or chemical care units for soft cell contact lenses are dispensed pursuant to the prescription, the dispensing optician or optometrist will be considered the consumer of such units and tax applies to the selling price of these units to the dispensing optician or optometrist.

EYEGLASSES, ETC. (Contd.)

In all other cases, the physician and surgeon, optometrist, or dispensing optician is a retailer of such units and tax applies to the gross receipts from the retail selling price of the unit to the patient or customer. Sales of these units by other retailers such as drug stores are likewise subject to tax. 2/9/81; 7/10/96.

225.0135 **Thermal and Chemical Care Units Sold by Dispensing Opticians.**Dispensing opticians will be accorded the same treatment as physicians and surgeons or optometrists when thermal and chemical care units are dispensed to patients. As such, dispensing opticians are the consumers of thermal and chemical care units they dispense pursuant to a prescription from a physician and surgeon or optometrist for contact lenses. Tax applies when such units are sold to the dispensing optician. In all other instances, the dispensing optician is the retailer of such units and tax applies to the gross receipts from such retail sales. 1/29/81.

225.0140 **Tinting of Clear Contact Lenses.** Charges for tinting clear contact lenses furnished by doctors is a step in the creation or production of new lenses, and are subject to sales tax. 6/10/93.

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FABRICATION
See Producing, Fabricating and Processing Property Furnished by Consumers—General Rules.

228.0000 FACTORY-BUILT HOUSING—Regulation 1521.4
See Construction Contractors.

(a) SPECIFIC USE OF PROPERTY

228.0050 **Factory-Built Housing Classification.** Sectionalized construction erected on the property of a hospital for use as doctors' offices does not qualify for a factory-built housing classification because it is not a dwelling or living unit. 1/21/77.

228.0250 **Kits.** A kit containing only walls and roof elements does not qualify as factory-built housing. The regulation requires a floor element as well. The providing of a concrete slab or mud sill at the building site would not bring the kit within the regulation because the regulation requires that the floor be also factory built. 5/30/75.

230.0000 FEDERAL AREAS—Regulation 1616
Indian Reservations, sales on, see Indians.

230.0020 **Boat.** Use of boat on territorial waters located within the constitutional geographic area of this state constitutes a use within this state. 6/14/51. (Am. 2000–1).

230.0080 **Ski Lifts.** The purchase of ski lift equipment to be used by operators on Federal Forest Service Land is subject to sales tax. 11/18/69.

230.0100 **Vending Machines.** Inasmuch as post restaurants and Navy cafeteria associations are recognized as federal instrumentalities, the tax does not apply to sales through vending machines located on military installations by operators who lease the machines to these federal instrumentalities, which acquire title to and sell the merchandise through the machines to authorized purchasers. 8/28/64.

235.0000 FEDERAL TAXES—Regulation 1617

235.0020 **Contingent Reserve on Seller's Books.** A contingent reserve for an unpaid protested amount of exempt federal tax, pending litigation, is not deductible from the measure of sales tax. 7/31/51.

235.0025 **Environmental Taxes.** The federal taxes imposed by Public Law 95–510 (Statutes of 1980) which adds "Chapter 38, Environmental Taxes" (commencing with section 4611) to subtitle D of the Internal Revenue Code of 1954 (26 U.S.C. sections 4611, 4612), are environmental excise taxes imposed on importers or manufacturers within the meaning of Revenue and Taxation Code section 6012(c)(4), and are therefore includable within the definition of gross receipts. 4/22/81.

FEDERAL TAXES (Contd.)

235.0030 **Federal Diesel Fuel Tax.** The 2.5 cents a gallon federal diesel fuel tax imposed by the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) is an excise tax and is included in the definition of "gross receipts." It is not one of the excise taxes to which refund allowances specified in the Internal Revenue Code may apply. Accordingly, the excise tax will always be included in the measure of tax of retail fuel sales on which the tax is imposed. 2/13/91.

235.0040 **Federal Excise Tax.** Section 4051 of the Internal Revenue Code imposes a tax on the first retail sale of certain items of tangible personal property (generally truck and trailer bodies and chassis of a kind used for highway transportation). The tax imposed under that section is not included in gross receipts subject to California tax. 2/18/94.

235.0060 **Fees on Imports.** Consular and brokerage fees on imports are includible in the measure of the use tax if they are part of the seller's expense of doing business. If, however, the seller obtains such services as the agent of the buyer and binds such buyer contractually to third parties for the payment of such fees, they are not includible in the measure of the tax. 3/16/54.

235.0070 **Federal Excise Tax on Heavy Trucks.** The 12% Federal Retailers' Excise Tax on Heavy Trucks (26 U.S.C. s 4051 et seq.) is a tax imposed on retail sales and excludable from the measure of California sales and use tax. 1/10/89.

235.0080 **Federal Transportation Tax** is part of gross receipts subject to sales tax if seller pays transportation tax to carrier, title passing to buyer at destination. 3/14/50.

235.0090 **Highway Revenue Act of 1982.** This Act, which is Title V of the Surface Transportation Assistance Act of 1982, amends or adds provisions to Title 26 United States Code (Internal Revenue Code of 1954) relating to fuel and other highway taxes. For sales and use tax purposes, the Act does not affect our present method of taxing sales of fuels or tires.

The Act does affect our method of taxing sales of trucks, tractors, and trailers. The old manufacturer's excise tax was properly included in the measure of the sales and use tax. However, under the Highway Revenue Act of 1982, the new 12 percent and the transitional 2 percent tax (operative 4/1/83) are excluded from the measure of our sales and use tax as these are taxes imposed on the retail sale or purchase of the taxed vehicles. 3/11/83.

235.0100 **Imports.** An excise tax imposed by the United States upon imports of coconut oil and paid directly to the United States by the importer and user, is not includible in the measure of the use tax. 3/4/54.

235.0105 **Luxury Tax.** Effective January 1, 1991, the United States has imposed a new retail excise tax, on the first retail sale of vehicles, boats, aircraft, jewelry and furs, to the extent that the price for such goods exceeds certain specified amounts. The rate of tax is 10 percent. The new tax is excludable from "gross receipts", under Revenue and Taxation Code Section 6012(c)(4)(A). The amount of any such tax is nontaxable under the Sales and Use Tax Law, whether imposed

FEDERAL TAXES (Contd.)

with respect to a sale involving a transfer of title or a lease transaction which is treated as a ''sale'' and ''purchase'' under Revenue and Taxation Code Sections 6006 and 6010. 12/6/90.

235.0110 **Luxury Tax—Nonqualifying Lease.** Where the lessor leases the vehicle under a nonqualifying lease, the first retail sale is the sale of the vehicle to the lessor and the federal luxury tax is imposed on that sale, not on the lease. A nonqualifying lease is a lease with a term of less than one year, such as a daily or other short term rental. Where the luxury tax is not imposed upon the transaction subject to sales or use tax, the luxury tax cannot be passed through to that subsequent taxable transaction and excluded from the gross receipts of that transaction. Thus, no amount of the rentals on daily or short term rentals is excludable from the measure of tax. 6/22/92.

235.0115 **Luxury Tax—Qualifying Lease.** Revenue and Taxation Code Section 6012 excludes taxes imposed by the United States upon or with respect to retail sales. The federal luxury tax is a tax on retail sales which includes leases. When a lessor of a qualifying lease elects to pay the luxury tax up front, he or she is paying a federal excise tax on the lease which is a retail sale. Qualifying lease is a lease with a term of one year or more. Thus, the luxury tax on the lease is a tax imposed by the United States upon or with respect to retail sale, and is excluded from gross receipts. Assuming that the lease is a continuing sale and purchase, the amount excluded is a portion of each rental payment which, if the rental payments are equal, is calculated by dividing the total amount of the luxury tax by the number of rental payments due under the initial term of the lease.

Where the luxury tax is imposed on rental payments, the amount of the luxury tax on each rental payment is excludable from the measure of tax whether the luxury tax is separately stated or included in the rental payments set forth in the lease. Also, if the lessor elects to pay the luxury tax up front and the lessee reimburses the lessor for the tax at the beginning of the lease, the reimbursement is not included in the measure of tax. 6/22/92.

235.0116 **Federal Luxury Tax—Repeal of.** A federal luxury excise tax was imposed on certain sales of vehicles, boats, yachts, aircraft, jewelry and fur articles from January 1991 to December 31,1992. The tax was excluded from ''gross receipts,'' whether imposed with respect to a sale involving transfer of title or a lease transaction which was treated as a ''sale'' and ''purchase.''

The luxury tax applied to the ''first retail sale'' which was defined as the first sale, for a purpose other than resale, after manufacture, production, or importation. No luxury tax was due on a sale to a lessor who leased the property under a ''qualified lease'' (a lease with a term of one year or more). If the lease was not treated as the first retail sale, and unless an election was made to pay the total luxury tax up front, the luxury tax was imposed on each lease payment. Where the luxury tax was imposed on rental payments, the amount of the luxury tax on each payment was excludable from the measure of tax whether the luxury tax was separately stated or included in the rental payments set forth in the lease.

FEDERAL TAXES (Contd.)

Thus, a refund of the luxury tax involving sales of vehicles used in ''qualified leases'' will not require a refund of any sales or use tax.

In a ''nonqualified lease'' (a lease with a term of less than one year), the sale to the lessor was the first retail sale and the lessor was required to pay luxury tax on that sale. While the amount of the luxury tax may presumably be passed through to the lessee, it is treated for use tax purposes as any other overhead expense passed on to the lessee. In order to file a claim for refund of the luxury tax with the IRS, the lessor must either return the amount of the luxury tax collected from the lessee or certify that it was not collected from the lessee. In limited circumstances, a refund of the use tax paid (measured by the amount of the luxury tax cost reimbursement included in ''rentals payable'') will be required. Thus, the only sales or use tax implication would be with respect to a lease of a passenger vehicle in a nonqualifying lease where the lessor repays the amount collected for the luxury tax to the lessee. Such repayment would be treated as a prior adjustment to the lease contract. 10/21/93, 10/27/93.

235.0120 **Ozone-Depleting Chemicals.** The federal excise tax, effective January 1, 1990, imposed by Section 4681 of the Internal Revenue Code on ozone-depleting chemicals is a manufacturers' tax and is included in gross receipts subject to sales tax and the sales price subject to use tax. Section 4681 imposes a tax on any ozone-depleting chemicals sold or used by the manufacturer, producer, or importer thereof, and on any imported taxable product sold or used by the importer thereof.

The federal excise tax imposed by Section 4682 of the Internal Revenue Code on any ozone-depleting chemical held on January 1, 1990, by other than a manufacturer, producer or importer thereof is not subject to California use tax. The use tax is measured by the purchase price and the federal excise tax imposed after the sale, self declared and paid directly to the United States on tangible personal property is not subject to the use tax. Section 4682(h) imposes a tax on any ozone-depleting chemical which is held by any person, on January 1, 1990, for sale or for use in further manufacture.

Section 4681 is also imposed on any imported taxable product sold or used by the importer hereof. The amount of the tax is the estimated value deemed to represent the cost of any ozone-depleting chemical used as material in the manufacture of the product and is paid directly to the United States. This self-declared federal excise tax is not to be included in the purchase price subject to California use tax if the product is used by the importer, as the consumer. However, if the product is sold and the federal excise tax is recovered as an expense, tax will apply whether the excise tax is separately stated or included in the selling price. 4/17/90; 6/28/91.

235.0140 **Photographic Apparatus.** Federal excise tax on photographic apparatus is a manufacturer's excise tax and is included in gross receipts subject to sales tax. 10/24/50.

235.0180 **Tires and Tubes.** The tax on tires and tubes is a manufacturer's excise tax and is not deductible from gross receipts subject to sales tax. 4/20/50.

FEED
See Animal Life and Feed.

FEES
Agency, see Advertising Agencies, Commercial Artists and Designers. C.O.D., see C.O.D. Fees. Gross receipts, various fees as included within, see Gross Receipts.

FERTILIZER
See Seeds, Plants and Fertilizers.

236.0000 FILING SALES AND USE TAX RETURNS

236.0010 **Authorized Signature.** Section 6452(b) prescribes the requirements for filing sales and use tax returns. To comply with this requirement, sales and use tax returns must be signed by one of the following:

a. The owner of the business, in the case of a sole proprietorship.

b. A responsible corporate officer, in the case of a corporation.

c. A general partner, in the case of a partnership.

In any of these cases the person required to sign the return may also give written authorization to another person, including an employee or independent accountant, to sign the return. 6/8/90.

236.0475 **Lessor Required to File Returns.** Lessor rents small pick-up trucks and cargo vans to customers of a retailer of other property (retailer) for short terms, generally three hours or less. The lessor has no rental locations other than the retailer's location. The vehicles are not mobile transportation equipment. The vehicles are rented by the customers at the retailer's service counters. The retailer's employees handle all facets of the rental arrangements, processing all paperwork and checking the vehicle in and out. The vehicle rental agreement between the lessor and the individual customer explicitly provides that the retailer is not a party to contract and accepts no responsibility or liability under the contract. The retailer collects the rental amounts on behalf of the lessor, and also adds and collects California use tax from the customers on the rental receipts. The transactions are recorded on the retailer's point of sales computer system, which tracks revenue and use tax collected. The contract between the retailer and the lessor requires the retailer to remit to the lessor the net proceeds from the rental agreements, less the use taxes collected and an agreed fee payable by the lessor to the retailer. The contract also states that the retailer assumes responsibility for the remittance of collected use tax to the governmental authorities.

A review of the actual contracts might indicate that the lessor was actually leasing the vehicles to the retailer for sublease to its customers. Assuming such is not the case and the lessor is leasing the vehicles to the retailer's customer, the lessor is required to report and remit to the Board the tax due on the rentals payable by the lessees. That is, the retailer may not report the tax on its returns. Instead, the tax must be reported on separate returns filed by the lessor. Of course, the lessor may authorize the retailer to act as its agent to prepare, sign, and file the

returns on the lessor's behalf. Even if it does so, the retailer may not combine that return with its own return, but must file a separate return under the lessor's name. 1/29/97.

236.1010 **Sale of Assets.** A corporation engaged in the retail sale of computers and related items sold all of its business assets effective May 31, 1987, but failed to report or pay tax on the sale of assets. The corporation objects to the application of tax on the basis that the purchaser filed under Chapter 11 of the Bankruptcy Act on January 11, 1989, making it doubtful whether all of the consideration due under the contract of sale will be received.

Tax on the sale of the assets should have been reported and paid with the corporation's return which was due on or before July 31, 1987. This means that payment of the tax should have been made before the purchaser filed for protection under Chapter 11. The corporation is entitled to relief only after the amount claimed as a bad debt is written off for income tax purposes. When the corporation writes off any amount as a loss on this transaction, the corporation will be entitled to a credit or refund at the time the write-off is made. 5/18/90.

FINISHERS
See Manufacturers of Personal Property; Repainting and Refinishing.

FIXTURES
See Buildings and Other Property Affixed to Realty; Construction Contractors.

238.0000 FLAGS, PRISONERS OF WAR BRACELETS AND FOOD OR BEVERAGES TRANSFERRED BY CERTAIN NONPROFIT ORGANIZATIONS—Regulation 1597
See also Nonprofit Organizations.

240.0000 FLORISTS—Regulation 1571

240.0005 **Balloons.** The term "etc." as used in Regulation 1571 includes other tangible personal property such as balloons. 11/20/90; 5/29/96.

240.0008 **Decorating, Consulting, Installing.** A florist's charges for labor to create or add to a flower arrangement or other decoration, e.g., decorating a premanufactured arch with flowers, are subject to tax as steps in the making of the final product. It is immaterial whether the customer owns the flowers, arch, or whether the labor is performed at the customer's event site.

A florist's charges for decorating services, such as planning a decorative scheme, designing decoration for a wedding reception, visiting the event site, and consulting with customers, are taxable when performed in conjunction with the sale or fabrication of tangible personal property.

A florist's installation charges are not subject to tax. Installing does not mean deciding where to place the property; it means the physical act of affixing or placing the property in position. For example, if the florist sells a customer a wreath or garland, the charges for the wreath or garland (including the fabrication labor) are subject to tax, but a charge for actually hanging the wreath or garland

is nontaxable installation labor. However, charges for the removal and return of decorations are not includible in nontaxable installation charges. 3/20/98. (M99–2).

240.0010 **Fabrication Labor.** A florist contracts with two customers to periodically deliver fresh flowers, remove old flowers from vases and leave them on a nearby table or counter and arrange the fresh flowers in the now empty vases, all for a specified lump-sum price.

The action of arranging the flowers in the vases is a taxable fabrication of flower arrangements rather than exempt installation, because the customers are not merely purchasing flowers but are purchasing aesthetically arranged flowers. In addition, installation generally connotes the anchoring, attaching, and connecting of property to other property by means of such items as glue, bolts, screws, etc., to make the connection. In this case, no such attachment has been made. 5/29/91.

240.0030 **Flower Arrangement—Customer's Flowers.** A firm goes to a customer's garden and cuts flowers and greenery from the garden. After cutting she reconditions them (e.g., dethorns and strips some leaves from the stems) and then arranges them in a floral display. Once a week she returns and refreshes each arrangement with additional flowers and discards the spent ones. The customer is charged on an hourly basis. Occasionally, the flowers used are from the firm's own supply for which a separate charge is made.

The gathering of flowers from the garden is neither fabrication labor nor the sale of tangible personal property and the charge for this function is not subject to tax. The ''reconditioning,'' refreshing, and arranging constitutes fabrication labor, and charges for these functions are subject to sales tax. 4/29/97.

240.0033 **Florist Delivery Service—Tele-Florist.** A firm headquartered in California intends to direct its customers to place orders for flowers to its designated ''800'' number. The firm will bill its customers at the time the order is taken and will place the order with an unidentified vendor who will deliver the flowers to the intended recipient. The vendor will prepare and deliver the floral arrangement and bill the firm at wholesale cost. The firm will not maintain any inventory of plants or flowers, and asserts that it is not a florist.

The California courts have consistently held that persons making sales of tangible personal property which are delivered by the manufacturer or creator of the property will nonetheless be considered retailers if they hold themselves out as the suppliers of the merchandise purchased. (See *Meyer* v. *State Board of Equalization* (1954) 42 Cal.2d 376 and *Bank of America* v. *State Board of Equalization* (1962) 209 Cal.App.2d 780.) The *Meyer* court, in finding that the party that solicited the order was a California retailer, based its decision on its conclusion that these transactions constituted sales for resale from the supplier to the solicitor followed by a subsequent retail sale by the solicitor to the purchaser. Here, the firm's transactions come within the facts of the Meyer case. Therefore, the firm is a retailer (a florist) who purchases, for resale, the flowers from the

FLORISTS (Contd.)

delivering florist. This conclusion is further supported by the fact that the firm will be billed, by the delivering florist, "on a wholesale basis."

Accordingly, all orders received by the firm, which is headquartered in California, are subject to sales tax regardless of whether the flowers are delivered inside or outside of California. On the other hand, if the firm was located in Oregon, California sales tax would not apply to any of the orders taken at the Oregon location regardless of the place of delivery or the residency of the person placing the order. (Regulation 1571). 12/23/96.

240.0035 **Flower Ordering Service.** A firm contracts with a multi-state retailer to fill orders for flowers which have been placed with the multi-state retailer. The firm receives the order for the flowers via a WATS line. It does not have an inventory of flowers, refrigeration equipment, trucks, or any other equipment generally owned or possessed by a retailer. The firm is a "florist" for the purposes of Regulation 1571 and it is subject to its provisions. 8/13/85.

240.0040 **Out-of-State Shipments.** Flowers shipped out-of-state by California florists are exempt from sales tax if the seller makes delivery through a common carrier or his own delivery facilities. 3/6/53.

245.0000 FOOD PRODUCTS—Regulation 1602
See Taxable Sales of Food Products; Vending Machine Operators; Reporting Methods for Grocers.

(a) IN GENERAL

245.0020 **Albumin** sold by a drug company to a hospital to be used as a culture medium to grow bacteria and other microscopic organisms for research is not an exempt food product for human consumption. 4/24/62.

245.0028 **Aloe Berry Nectar.** Aloe Berry Nectar's label states that this product is "100% Stabilized Aloe Vera with Natural Cranberry and Apple Concentrate", and makes no medicinal or weight-loss claims for it. This is a food product, the sales of which are not subject to tax. 6/17/91.

245.0035 **Asian Specialty Foods.** For the period July 15, 1991 to November 30, 1992, candy, confectionery and snack foods were excluded from the definition of food products and subject to sales and use tax. The following is a classification of various Asian specialty foods within the meaning of Section 6359 of the Revenue and Taxation Code and Sales and Use Tax Regulation 1602:

FOOD PRODUCTS (Contd.)

Mochi is a ''snack cake'' which is a ''snack food''. This product is a sponge-cake base which is folded up around a sweet bean paste interior and then steamed. It is also sold in individual pre-wrapped servings.

Yokan is a candy. This product is made by steaming beans into a gelatinous mass, which is sweetened by the addition of sugar. It is used as a dessert or served with tea.

Manju and Monaka are ''snack cakes'' which are ''snack foods''. These products are rice flour dough formed around a sweet bean paste center and steamed or baked in individual portions. They are used as desserts and tea cakes. The fact that some forms of manju are stored in the freezer does not affect the overall classification. 6/3/92.

245.0037 **Aspertame.** Aspertame is the chemical compound which composes such sugar substitutes as ''Nutrasweet'' and ''Equal.'' Sugar substitutes consisting of Aspertame qualify as ''food products.'' 5/31/91.

245.0060 **Baby Formulas.** Baby formulas sold in bottles with attached nipples, collars and discs, constitute sales of exempt food products in nonreturnable containers. Gross receipts from such sales are not taxable. 12/9/63.

245.0080 **Baby Formulas in Disposable Formula Bottles.** The sale of baby formulas in disposable formula bottles containing pre-sterilized disposable nipple units is an exempt sale. 3/29/65.

245.0085 **Barley Essence Barley Powder.** Barley Essence Barley Powder is described as ''nature's concentrated whole food, containing vitamins, minerals, amino acids, active enzymes, and Chlorophyll for complete balanced nutrition.'' This is a powdered health food made from brown rice and the dried juice of the barley plant. This product is not described as a food or dietary supplement or

FOOD PRODUCTS (Contd.)

adjunct nor does it make any medicinal or weight loss claims. This product qualifies as a vegetable juice product, the sales of which are exempt from tax. 6/5/91.

245.0089 **Beer Ingredients.** The sale of yeast and Irish moss to customers who will brew their own beer qualify as sales of food products if the yeast is not sold as a dietary supplement and the Irish moss is not sold for medical or another nonedible purpose. The fact that the finished product, home brewed beer, results in a product that is not considered a food product for sales tax purposes does not alter the fact that these ingredients, in their packaged form as sold, constitute food products sold for human consumption. 8/10/95.

245.0100 **Bicarbonate of Soda.** Bicarbonate of soda sold by grocery stores in the form of baking soda is ordinarily sold for use as an ingredient of food products for human consumption. On the other hand, sales of bicarbonate of soda by a drug store are ordinarily for medicinal purposes.

Sales of this product for use as an ingredient of food for human consumption are exempt regardless of whether sold by a drug store or a grocery store. Sales of the product for medicinal use are taxable whether the sale is made by a grocery or a drug store. 5/17/51.

245.0140 **Sodium Bisulfite.** Sodium Bisulfite used on potatoes to preserve their whiteness is not a food product, and its sale to consumers, for example, by grocery stores, is subject to tax. However, where it is purchased by restaurants for fixing peeled potatoes so as to retard discoloration, it may properly be purchased ex-tax for resale since the compound becomes incorporated into the potatoes. 12/20/60. (Am. 2000–1).

245.0150 **Brewing Aid.** "Spring Water Mineral Brew Golden Cup Coffee Saver", a brewing aid, does not qualify as a food product under Section 6359 of the Revenue and Taxation Code. It is not a coffee extender or blend or any other coffee substitute. It is, rather, a brewing aid whose primary function is to extract all the flavor without adding any other flavors. It is mixed with grounds prior to brewing so that only half of the normal amount of coffee is used to brew a full pot. Most of the Coffee Saver stays in the grounds and is thrown away with them. 6/6/91.

245.0180 **Cake Decoration—Sale to Bakery.** The sale of cake ornaments to a baker is a sale for resale, the baker being regarded as selling food products, without the necessity of any allocation of the price to the nonedible contents of the cake. This is based upon the assumption that the value of the ornaments would usually be less than 10 percent of the value of the cake. The assumption is based upon a theory comparable to Regulation 1602(b), providing that where the value of the nonfood product content of a complete package is less than 10 percent of the total value, the "essential character of the complete package" would be the food for human consumption. If the value of the decorations should exceed 10 percent, then it would be necessary for a segregation to be made and the tax paid upon the retail selling price of the nonedible decorations or other contents of the complete package. 2/2/51.

FOOD PRODUCTS (Contd.)

245.0190 **Cake Decoration—Silver Balls.** Candy-coated cake decorations called ''silver balls'' are edible and qualify as ''food products'' within Section 6359. Sales of ''silver balls'' for human consumption are nontaxable. 6/9/82.

245.0205 **Calcium Propionate and Epodium Propionate.** Neither calcium propionate nor sodium propionate are food products, although they do become a component part of bread which is a food product. The food product exemption is based on the nature of the property at the time it is sold. Accordingly, while sales of these products to bakeries which resell the bread are exempt as sales for resale, sales to customers such as a governmental agency which bakes bread for its own use are subject to tax. 5/24/55.

245.0280 **Carbonated Beverage Resembling Champagne.** A nonalcoholic carbonated beverage prepared and sold to resemble champagne is not a food product within the meaning of Section 6359. 6/22/65.

245.0285 **Carbonated Fruit Juices.** Carbonated products which are considered 100% natural fruit juices qualify as exempt ''food products''. If the carbonated product includes a preservative, such as sodium benzoate, or any other additive, it will not be considered a natural fruit juice and tax will apply to its sale. 3/5/87.

245.0290 **Chemicals Used in Experimental Diet.** Mixtures of amino acids, vitamins and minerals are combined with fruit-flavored liquids and used as an experimental diet for human beings. Inasmuch as these combinations are basic elements of normal food for human consumption and are intended to be substituted therefor, they qualify as food products under Section 6359 7/21/67.

245.0300 **Chinese Medicinal Herbs.** Products marketed as ''Chinese medicinal herbs'' through specialty stores do not qualify as either food products or medicines. They are not food products because Regulation 1602 specifically excludes medicines from the definition of food products, and they are not eligible for exemption as medicines because the vendor is not a registered pharmacist nor is the product dispensed by a person or in a manner required by Regulation 1591. 12/2/83.

245.0315 **Combination Package—Flower Pot Bread Baking Kits.** These ''Baking Kits'' are composed of a six inch clay pot with a package of bread mix inside the pot. The clay pots are covered with decorative wrapping and imprinted paper. The clay pot represents 20 percent of the total cost of the product.

Since the cost of the clay pot represents 20 percent of the total cost of the baking kit, it is expected that the retail value of the clay pot represents more than 10 percent of the retail value of the baking kit, exclusive of the container. Therefore, a segregation must be made and the sales tax is measured by the retail sales price of the clay pot. (Regulation 1602(b)). 11/14/95.

245.0320 **Communion Wafers.** Communion wafers are food items the sale of which is exempt. 8/5/66.

FOOD PRODUCTS (Contd.)

245.0330 **Cooking Wine.** Cooking wine, which is rendered unfit for beverage use within the meaning of section 5362 of the Internal Revenue Code and therefore may be used only for cooking, qualifies as a food product. 9/21/94.

245.0340 **Curing Salt.** Curing salt sold to butchers for curing meat is permanently incorporated into the meat and such sales are exempt both as sales of a food product and as sales for resale. In the curing process, it is assumed that a fairly large amount of the curing salt does not become permanently incorporated into the meat but is lost or discarded. Nevertheless, this is not important. The critical factor is whether this product is purchased for the purpose of being incorporated into the meat. If this is the purpose, it is not significant that the process used entails a large amount of waste. 10/6/55.

245.0360 **DDS Acidophilus.** DDS Acidophilus is a natural laxative, which when consumed before meals, aids in food digestion and in correcting digestive disorders and also helps to correct lactose intolerance, prevents bad breath, reduces cholesterol, corrects acne problems, and prevents travelers diarrhea. Since the label makes specific medicinal claims, the sales of this product are subject to tax. 6/5/91.

245.0370 **Distilled Water.** When the label on a bottle of distilled water does not include a reference to intended use or indicates the water is only for non-food purposes, the distilled water should not be regarded as sold for human consumption and its sale is thus subject to tax.

When the label indicates that the distilled water is for drinking only or includes references to both food and non-food uses, the sale of that bottle of distilled water qualifies for exemption from tax under section 6359. 12/01/00. (2001–3).

245.0380 **Drug Stores,** selling food products, cannot adopt percentage of purchases method of computing tax. 11/8/50.

245.0390 **Edible Flowers.** Sales of edible flowers are taxable sales. Flowers are ordinarily used in gardens or for decoration and not as food for human consumption. Section 6359(b) specifically provides that food products include ‘‘vegetables and vegetable products’’ and ‘‘fruits and fruit products’’ but does not list edible flowers as a food product. The fact that an item is edible does not by itself make the item a food product. 2/6/91.

245.0395 **Essential Oils.** These are products such as oil of clove, oil of fir, oil of lemon, etc. These oils are sold in one ounce bottles with no dropper. The labels contain no statement as to use. It is understood that ‘‘essential oils’’ sold in one ounce bottles are generally used as scents and not meant to be ingested. As such, the essential oils are not food products and their sales are subject to tax. 8/23/89.

245.0400 **Fish Bait.** Sales of mudsuckers used as bait are subject to sales tax since bait is not an exempt food product. 8/24/64.

245.0420 **Fish Bait—Nonliving.** Although sales of sardines for human consumption are exempt, sales of ‘‘nonliving’’ fish or animal products for use

strictly as fish bait and not intended for human consumption do not fall within Section 6358(a) and hence are subject to sales tax. (For treatment of live fish bait refer to Annotation 110.0150). 6/15/60.

245.0450 **Flavored Mineral Waters.** Flavored, noncarbonated mineral waters which make no medicinal claims are exempt food products. 1/27/95.

245.0460 **Low-Alcohol Wine.** Although it contains only .49% alcohol by volume, St. Regis Vineyard's Wine Without Alcohol is nevertheless a ''. . . spirituous, malt or vinous liquor,'' specifically excluded from the term ''food products'' by Regulation 1602(a)(2). 7/31/86.

245.0480 **Gatorade.** Gatorade, a noncarbonated soft drink, is an exempt food product on and after January 1, 1970, pursuant to Section 6359 as amended 9/19/69.

245.0485 **Goetz Pale "Near Beer."** The product label indicates that the product is ''nontaxable under section 5051 I.R.C.'' and that the product is brewed with grain, malt, hops, yeast and water.

The statement ''nontaxable under section 5051 I.R.C'' merely indicates that Goetz Pale ''Near Beer'' is not federally taxed as an alcoholic beverage. According to the Department of Alcoholic Beverage Control (ABC), this product is not registered in California as an alcoholic beverage. The alcohol content of the product is below that necessary to be legally defined as an alcoholic beverage for ABC purposes.

However, from the ingredients and name, the product does contain some alcohol and that it is naturally carbonated. Even though the alcohol content is below that required under ABC rules for an alcoholic beverage, this product is a spirituous, malt liquor to the same extent as hard apple cider which is not exempt as a spirituous liquor. Additionally, it is assumed that this product is carbonated and thus taxable. 4/29/75.

245.0492 **Hains Linseed Oil.** Linseed oil is extracted from flaxseed and may also be referred to as flaxseed oil. Hains linseed oil is an edible oil from vegetable origin which, when sold for human consumption, qualifies as a food product. It follows that the sale of Hains linseed oil is not taxable. 8/25/88.

245.0495 **Herbal Chew.** An herbal chew that is not made of gum is not a food product or chewing gum even though it contains no tobacco. Accordingly, its sales are subject to tax. 10/19/94.

245.0496 **Herbal Extracts.** These are plant extracts which have been cold processed in a mixture of alcohol and water. They are sold in a one ounce bottle with a dropper. The label states ''for use as a beverage.''

The herbal extracts as described are exempt food products provided that they are sold as a beverage and provided that the label or packaging makes no claim to the product's medicinal or curative qualities or its dietary benefit. 8/23/89.

FOOD PRODUCTS (Contd.)

245.0498 **Herb Capsules.** Nature's Sunshine Herb products are sold in capsule form. They are an herbal food combination containing such items as kelp plant, dandelion root and alfalfa herb.

Since the label makes no medical claims and it does not state that the product is to be used as a dietary supplement or adjunct, these products qualify as food products the sales of which are exempt from tax. 2/5/92.

245.0499 **Herbal/Food Combination.** Under California law, no particular claims for nutritive value are required for an item to be considered a food for human consumption. Herbal products, the labels of which make no medicinal claims nor designate the product as a food supplement or adjuncts, are food products. Thus, the sale of such products are exempt from sales and use taxes. 1/31/94.

245.0499.200 **Herbal Tea Labeled as Herbal Medicine.** Smooth Move, Throat Coat, Gypsy Cold Care, PMS Tea and Breathe Easy are all herbal teas distributed by Traditional Medicines, Inc. Each of these teas make specific medicinal claims and their sales are subject to tax.

FOOD PRODUCTS (Contd.)

Nighty-Night herbal tea does not make specific medicinal claims but simply has the following legend:

''Since the beginning of time, herbs have played an important role in the development of medicine. Long before their use as beverage teas, herbs were used in the treatment of illness. In fact, up until the turn of the century, herbs still provided the basic ingredients for most medicines. With the development of drug chemistry, many of the simple ways of traditional medicine were left behind.''

Nighty-Night is not an exempt food product. The generalized statement is sufficient to classify it as an herbal medicine tea. 10/27/94.

245.0499.250 **Herbal Teas.** When an item is sold as a medicine, it does not qualify as a food product. Thus, the sale of an item as a medicine is subject to tax unless qualifying for the prescription medicine exemption explained in Regulation 1591. Whether a product is sold as a medicine is determined based on the label on the product as well as product literature that may be given to purchasers and potential purchasers in order to market it as a medicine. For example, a label containing detailed cautionary instructions might indicate that the product is being marketed as having medicinal qualities. If specific medicinal claims are made in any of the product literature, sales of the product are not exempt from tax as food products.

If a product otherwise qualifying as a food product is not sold as a medicine, then the form in which it is sold is relevant to determine if it is excluded from the definition of food product as a supplement. A product does not qualify as a food product if it is sold in liquid, powdered, granular, tablet, capsule, lozenge, or pill form if either: 1) the product is described as a food supplement, food adjunct, dietary supplement, or dietary adjunct on its labels or packaging, or 2) the product is prescribed or designed to remedy a specific dietary deficiency or to increase or decrease generally the intake of vitamins, protein, minerals, or calories.

If a product is not sold in liquid, powdered, granular, tablet, capsule, lozenge, or pill form, the supplement exclusion is not relevant. For example, an herbal tea that would otherwise qualify as a food product and which is sold in cut leaf form is not a supplement excluded from the definition of ''food product'' without regard to the manner in which it is sold. Assuming no medicinal claims are made with respect to that cut leaf herb tea, it is a food product and its sale is exempt from tax (without regard to whether its label makes ''supplement'' claims). If that same product is sold in one of the listed forms such as powdered or capsule, however, further analysis is required.

If the label or other product literature accompanying the package containing a product in one of the listed forms makes supplement claims, the product does not qualify as a food product and its sales are subject to tax. While the presence of instructions on a product label regarding when to take the product in relation to meals is an indicator that the product is meant as a supplement to meals, the total circumstances must be considered. For example, in the case of teas, an instruction to ''take with meals'' does not in itself cause a tea product to be considered a food supplement.

FOOD PRODUCTS (Contd.)

A product in one of the listed forms will also fail to qualify as a food product if the product is prescribed or designed to remedy a specific dietary deficiency or to increase or decrease generally the intake of vitamins, protein, minerals, or calories. Similar to the determination of whether a product is sold as a medicine, the product label, packaging, and brochures and other product literature that may be given to purchasers and potential purchasers help determine whether a product is prescribed or designed for these purposes. Subdivision (a)(5) of Regulation 1602 sets forth other considerations used to determine if a product will be regarded as prescribed or designed for these purposes without regard to whether there are any such claims on product literature. 8/25/97. (M99–1).

245.0499.300 **Herbal Teas and Herbal Tea Capsules.** Herbal teas are excluded from the definition of ''food products'' under Regulation 1602(a)(4) if specific medicinal claims are made on the label or packaging. These would include claims stating unequivocally that the product is an herbal medicine even though not stating what specific condition it is designed to treat. These products are also excluded from the definition of ''food products'' under Regulation 1602(a)(5) if the label or packaging of the herbal tea product states that the tea is a food supplement or adjunct. Herbal tea capsules are food products if the label or packaging makes no medical claims or does not state that the product is to be used as a dietary supplement or adjunct. Instructions on the herbal tea label merely stating ''take with meal,'' without more do not alone change the classification of the tea to a food supplement. 11/8/96.

245.0500 **Herbs,** for which no medicinal qualities are claimed, used solely to season, are exempt as food products. 12/13/50.

245.0501 **Herbs and Supplements.** A licensed acupuncturist in the state of California, with a doctorate in oriental medicine, is considered a primary health care practitioner in the state of California. The acupuncturist dispenses herbs and supplements to patients.

The Legislature, in adopting the language in Section 6369(a)(1) Revenue and Taxation Code chose to adopt the limiting definition of ''prescription'' found in Section 4036 of the Business and Professional Code rather than the broader interpretation implicit in Section 4937 Business and Professional Code. The reference in Revenue and Taxation Code Section 6369(a)(1) to ''person authorized to prescribe medicine'' means that person must be a physician, dentist, or podiatrist. Unless the acupuncturist is also licensed as one of these entities, his/her prescriptions are not exempted from the sales and use taxes as being within the prescription medicine exemption. In addition, the prescription must be filled by ''a registered pharmacist in accordance with the law''.

Since the sales are made for medicinal purposes, the herb and supplement sales also do not qualify under the food product exemption. 12/31/91.

245.0506 **Herbs—Unlabeled.** Herbs are sold to clients in brown paper bags by an acupuncturist. Many of the bulk herbs are listed as food products, but they are given with remedial intent. Sales of those herbs which are ordinarily food

FOOD PRODUCTS (Contd.)

products in unlabeled brown paper bags are exempt from tax under section 6359 provided that the only instructions regarding the herbs are oral. 8/26/96.

245.0518 **Honey.** Sales of honey which is sold as a nutrition source rather than as a sweetener but for which the label makes no medicinal or weight-loss claims are exempt from tax. 6/17/91.

245.0520 **Horse Meat Products.** Horse meat and horse meat products are ordinarily not regarded as food products for human consumption, being primarily purchased as food for animal consumption.

In order to be exempt, sales of such products must be supported by evidence that the property was in fact purchased for human consumption.

The fact that such products are inspected and suitable for human consumption is not sufficient proof for exemption. They must actually be used for human consumption. 11/25/53.

245.0580 **"Icee."** "Icee" is a carbonated beverage, in a slightly different form for serving, and is subject to tax. While the CO_2 contributes to the freezing process, it is also an essential part of the beverage itself. 3/24/70.

245.0590 **Ice Sold to Street Food Vendors.** A taxpayer rents hot dog carts to independent street vendors and also sells them ice without taking any resale certificates. The street vendors use some of the ice to keep their food products cool or fresh and some of the ice is resold in or with soft drinks. In lieu of clear evidence otherwise, the Board will regard 50 percent of the sales of the ice to be nontaxable sales for resale with the soft drinks and 50 percent as taxable sales of ice used in the vendor's business. The exemption provided by section 6359.7 does not apply to these taxable sales since that exemption applies only with respect to ice used in packing and shipping food products for human consumption by a carrier and not the use of the ice by street vendors. 6/19/95.

245.0620 **Imitation Lime and Lemon Juices.** Imitation lime and lemon juices are exempt. 5/13/64.

245.0640 **Knox Gelatin Drink.** Knox Gelatine Drink is an exempt food product, effective January 1, 1970. 3/24/70.

245.0652 **Liqueur-Filled Candy.** While chocolates filled with liqueurs meet the definition of candy and confectionery pursuant to Sales and Use Tax Law section 6359, they do not necessarily qualify for exemption as "food products." When these chocolates are sold with a label stating the sale to a person under age 21 is unlawful because the product contains sufficient amounts of alcohol, the products are taxable. "Spirituous, malt and vinous liquors" are specifically excluded from the term "food products." 1/5/90.

245.0660 **Liquid or Dry Tea.** Liquid or dry tea in half-pint containers with minimal additives is tax exempt. 8/25/67.

FOOD PRODUCTS (Contd.)

245.0680 **"Liquid Smoke."** Liquid smoke is considered to be sold for resale to a restaurant or other customer who applies the liquid smoke as an ingredient of barbecued meats which are to be sold. See Opinion of Attorney General 10638 dated July 2, 1936. 8/24/64.

245.0698 **Malt Extracts.** Dry and liquid malt extracts are food products even when sold by retailers of beer making supplies for the purpose of making beer or other carbonated and/or other alcoholic malt beverages. 5/8/91.

245.0700 **Malt Syrup.** Malt syrup, often sold as a substitute for molasses for the purposes of being an ingredient of, or upon, food products would be exempt . 6/22/53 (revised 1/1/70).

245.0710 **Manufacturer's Coupons Redeemed With Food Stamps and Cash.** When a retailer receives cash, manufacturer's coupons, and food stamps for a taxable sale, the amounts paid in cash as well as the amounts paid in manufacturer's coupons are subject to sales tax. USDA regulations are consistent with this application of tax.

When a person purchases mixed merchandise, some generally taxable and some exempt, and pays for it with food stamps and cash, the amount of the food stamps must be applied first to merchandise normally subject to sales tax. 11/1/91; 11/12/91.

245.0722 **Medical Claims.** Products such as herbal teas for which a specific medicinal claim is made are not ''food products.'' On the other hand, general claims about ''feeling better'' are not specific medical claims and such statements would not preclude classification of the product as a food product.

Distributors of herbal products which characterize their products as ''medicinal herbs'' would be considered as not selling food products since they make medicinal claims for their products. In these cases, the products are marketed for their medicinal qualities and the sales are subject to tax. For example, a product line which makes general medicinal claims for its products together with labeling such as Nighty Night ''A Dream of a Night-time Tea'' is sufficient indication that the item is being sold as a medicine and not a food product. 10/27/94.

245.0726 **Medicinal Herbs.** In determining whether medicinal claims are made for a product which would support a conclusion that sales of the product are taxable, the Board looks not only to the label but also other materials which are furnished to the customer. Catalogues which are supplied to customers in the package in which the company mails the product are taken into account to determine if these products, though ostensibly foods, are in fact sold as medicines. 2/25/97.

245.0740 **Monoglycerides.** The sale of monoglycerides for use as an ingredient or component part of a manufactured food product is exempt as a sale for resale purposes. 8/31/55.

FOOD PRODUCTS (Contd.)

245.0760 **Mono-Sodium-Glutamate.** Mono-Sodium-Glutamate is a taste intensifier added to food to enable the user to perceive the flavor to a greater degree than possible without it. In itself it has no flavor. It is marketed under several trade names, one of which is ''Accent''.

Mono-Sodium-Glutamate is a food product for human consumption within the meaning of the Sales and Use Tax Law. Accordingly, sales of Mono-Sodium-Glutamate are exempt from sales tax. 5/14/52.

245.0765 **Muesli, Pasta, Chili, and Soups.** These products are usually described as dehydrated cereal, pasta, stew, and soups. Although they probably contain a high proportion of powder, these items represent products traditionally accepted as foods. Therefore, despite the fact that these items are designed to decrease caloric intake, their sales are exempt from tax. 9/16/91.

245.0770 **Mycoban.** Mycoban, a preservative added to bread to inhibit the formation of mold, is not a food product. Accordingly, sales of Mycoban are subject to sales tax. 5/14/52.

245.0840 **Pan Oils.** Tax does not apply to sales of oils with a vegetable oil or lard base where these oils are ultimately consumed by humans as an ingredient of bread or other bakery products. These products fall within the definition of food products for human consumption set forth in Section 6359 of the Sales and Use Tax Law and are ultimately consumed by humans as an ingredient of the bread or other bakery products. On the other hand, the tax applies with respect to the sale of mineral oil or oil with a mineral oil base used for greasing pans or as divider oil, even though it may find its way into the bakery products. The product is not within the definition of food products for human consumption and is definitely purchased for some reason other than resale.

Mixtures containing beeswax, mineral oil, or other ingredients not within the definition of food products cannot be regarded as food products for human consumption for purposes of the sales tax. Therefore, the sale of these mixtures for use as pan grease, divider oil, and the like, are taxable retail sales. 3/24/52.

245.0860 **Pan Oils.** If a pan oil is essentially an edible oil of animal or vegetable origin, it is considered exempt. If, however, the oil has a substantial amount of mineral oil or other ingredient not within the definition of ''food products,'' the sale thereof is subject to tax. 5/14/53.

245.0900 **Petroleum and Mineral Oil,** tax applies to sale to bakeries for use in lubricating dough cutters and troughs although a portion of such lubricants is picked up by and becomes an ingredient of the bakery products. 6/23/50.

245.0920 **Peanuts,** dried salmon, pretzels and beef jerky are considered exempt food products. If, however, retailer provides any facilities for the consumption of such products their sale would be taxable. (For the period July 15, 1991 to November 30, 1992, pretzels were classified as taxable snack foods which were excluded from the definition of exempt food products.) 3/11/54.

FOOD PRODUCTS (Contd.)

245.0940 **Hypo-allergenic Baby Formula.** ProSobee, an infant formula made from soybeans containing no vegetable galactogens and Isomil, a milk-free, soy, infant formula, are exempt food products under Section 6359 of the Revenue and Taxation Code. 12/14/65.

245.0980 **Salted Wine.** Salted wine sold for use in cooking, is ''rendered unfit for beverage use'' under Section 5362(d) of the Internal Revenue Code and is not ''fit for beverage purposes'' under Section 23004 of the Business and Professions Code. It is, therefore, not a ''vinous liquor'' under Section 6359 of the Revenue and Taxation Code and, accordingly, qualifies as an exempt food product. 2/8/68.

245.1000 **Salt** sold for use in preserving or processing food products but not becoming part thereof is not exempt as a food product. 4/4/50.

245.1020 **Semifrozen Beverage Products.** Semifrozen beverage products marketed variously as ''frozen slush,'' ''fruit slush,'' ''Slurpee,'' ''Blizzard,'' etc., are subject to tax if they are carbonated and are exempt if noncarbonated. They are not snow-cones. 3/12/70.

245.1030 **Shaklee Products—Exempt.** Shaklee Slim Plan Drink Mix, Shaklee Meal Shakes and Shaklee Performance Drink Mix qualify as exempt food products under Section 6359. 11/27/91.

245.1040 **Sherbet.** In order to label a item as sherbet a manufacturer must incorporate in it milk or milk products and as such it is exempt. 5/9/61.

245.1060 **Soyamel.** Soyamel, as an independent food item, used as part of a regular diet or as a substitute for dairy milk for health reasons, qualifies as an exempt food product. 4/14/69.

245.1063 **Soy Drinks.** The following three soy based drinks—Vitasoy Vanilla Delite Natural Soy Drink, SoyMoo Non-Dairy Soy Drink, and Edensoy Natural Soy Beverage—qualify as food products the sales of which are exempt from tax. 1/31/92.

245.1066 **Sports Drinks.** Noncarbonated sports drinks such as Gatorade, Powerburst, Exceed, etc., qualify as food products the sales of which are exempt from tax under Regulation 1602(a)(1). 2/26/97.

245.1067 **Sports Energy Drinks.** Sales of sports energy drinks, as a product category, are nontaxable without regard to wording such as ''carbohydrate'' or ''energy,'' which may appear on their label. The products are little more than sugar and water and not supplemental or adjunct items to remedy gross dietary deficiencies or gross mineral depletion. These products are marketed as responsive to transitory nutritional depletion resulting from strenuous exercise. These products are nothing more than beverages. A sale of a product from this entire product category is nontaxable as a food product, without regard to insubstantial difference between products. 5/29/96.

FOOD PRODUCTS (Contd.)

245.1075 **Stretch Island Fruit Leather.** Stretch Island Fruit Leather is a compressed, dried natural fruit product consisting of fruit, fruit juices, and spices. It does not contain sugar, preservatives, artificial flavors or colors. It is not a ''snack food,'' it is a nontaxable food product. 9/6/91.

245.1080 **Survival Kits.** Where such kits contain food products as well as other items that are taxable and the kit is sold for a lump sum, an allocation between the taxable and non-taxable items must be made. 11/31/61.

245.1095 **Toppkrisp Nutritional High Fiber Meal Replacement.** From the brochure's reference to convenience and the fact that Toppkrisp Nutritional High Fiber Meal Replacement apparently does not need to be mixed with anything, it is assumed the product is similar to a wafer, cracker, or cookie. This product qualifies as a ''food product'' the sales of which are exempt from tax since it is not sold in a form described in Section 6359 (c). (Note during the period July 15, 1991 to November 30, 1992, the product was subject to tax as a snack food). 5/9/91.

245.1098 **Waxpacks—Gum and Cards.** Waxpacks are combination packages generally consisting of one stick of gum and various quantities of baseball cards. Sales of waxpacks are taxable. 9/26/89.

245.1100 **Wine Flavoring Extract.** ''Wine Chef,'' an alcohol-free instant wine flavoring added to food after cooking is a flavoring extract and an exempt food product. 10/21/69.

245.1101 **Yeast Granulars.** Tax does not apply to the sale of viable yeast which is sold as a food for human consumption in the production of bread and malted alcoholic beverages such as beer, mead, and ale. Tax applies to the sale of fermentive yeast used in the manufacture of wine because the yeast is used in the manufacture of the wine, not incorporation. This is distinguished from the yeast used in beer and bread which is incorporated and consumed by humans, while the yeast for wine is not incorporated and, thus, not consumed by humans. 11/23/83.

(b) DIETARY SUPPLEMENTS AND ADJUNCTS

245.1105 **Absorbent-C.** Absorbent-C are vitamin tablets which are excluded from the term ''food products.'' Sales of this product are subject to tax. 6/17/91.

245.1110 **Advanced Formula Fat Burners, Fat Burners.** These are tablets and capsules designed to help develop lean muscle tissue while losing unwanted and harmful body fat. These products are dietary supplements, the sales of which are taxable. 12/20/93.

245.1119 **Aloe Vera Gel.** Aloe vera gel consists of 99.55% aloe vera, .25% Irish Moss, and .20% sorbic acid (a food preservative). It is not labeled as a dietary supplement and is consumed as a beverage. Under these conditions it qualifies as an exempt food product under Regulation 1602. 8/21/89.

245.1120 **Aloe Vera Gel.** Aloe Vera Gel if sold for use as a dietary supplement or for medicinal purposes, does not qualify as a food product under Section 6359. 7/19/67; 2/11/91.

FOOD PRODUCTS (Contd.)

245.1121 **Amino Acids Pure Muscle Building Formuto, Amino 1000.** This product is in capsule form and described as a ''nutritional supplement'' designed to provide amino acids in order to maintain a proper level of protein for heavy exercise. The sales of this product are taxable. 12/20/93.

245.1122 **ANABAENA Flos Aqua** Is a freeze dried product consisting of pure premium blue-green algae. It is labeled as a pure food product and contains naturally chelated vitamins, minerals, lipids, nucleic acids, chlorophyll, amino acids, and enzymes. Regulation 1602 provides that ''. . . unusual foods such as brewer's yeast, wheat germ, and seaweed are not subject to tax unless their label states they are a food supplement or the equivalent.'' As such, ANABAENA Flos Aqua is a food product unless its label claims medicinal benefits or calls itself a food supplement. 11/16/81.

245.1124 **Avacare Complete.** This product does not qualify as an exempt food product because it is sold in powdered or granular form, is sold as a dietary supplement as part of a weight loss regimen, and does not contain all the nutritional elements or quantities required of a complete dietary food as required by Regulation 1602. 1/17/84.

245.1127 **California Medical Diet Nutritional Weight Loss Plan.** The California Medical Diet Nutritional Weight Loss Plan (CMD) is a nutritional preparation in powdered form to which water is added to make a liquid. Each serving of this product provides the user with 154 calories, 11 grams of protein, 14 grams carbohydrates, and 6 grams of fat. The maximum recommended dosage for this product (four servings per day) provides the user with a daily intake of 620 calories, 45 grams of protein, 156 grams of carbohydrates, and 24 grams of fat. The principal ingredients are milk desired proteins (Casein), fructose, and vegetable oils.

The CMD does not qualify as a food product because it is sold as a dietary supplement. The CMD is a product in powdered form and is described on its label as a diet food which is prescribed or designed to decrease the user's calorie intake and encourage weight loss. Furthermore, this product does not provide the user with a sufficient amount of calories in the recommended daily dosage to qualify as a dietary food under Regulation 1602. Therefore, tax applies to the sale or use of this product. 2/27/84.

245.1128 **Cambridge Diet.** Cambridge Diet is a dietary supplement or adjunct the sale of which is subject to sales tax. 3/17/83.

245.1128.010 **Cambridge Diet and Nutrition Bar.** The Cambridge Diet and Nutrition Bar is described as ''a delicious addition to the Cambridge Weight-Loss Program'' and a ''carefully balanced nutritional supplement for the Cambridge Nutrition Program.'' The bar is carob coated, peanut flavored, and is sold in bar form. Each 11 gram bar provides the user with 150 calories, 11 grams of protein, 17 grams carbohydrates, and 4 grams of fat. The user is advised of two patents, both of which are for inventions concerning dietary supplements and dietary methods for employing said supplements for the treatment of obesity. The

FOOD PRODUCTS (Contd.)

company also states that the diet can be used as a nutritional supplement separate and apart from the weight loss program.

It is concluded that the ''Cambridge Diet and Nutritional Bar'' is sold as a dietary supplement. However, section 6359 specifically excludes from the term ''food products'' dietary supplements in liquid, powdered, granular, tablet, capsule, lozenge, and pill form. Since the Cambridge Diet and Nutrition Bar is not sold in any of these specified forms, it is outside the exclusion from the exemption from tax under section 6359 for ''food products.'' Therefore, tax does not apply to the sale or use of this product. 9/27/83.

245.1129 **Capsules to be Taken Before Meals.** Peak 2008, Nature's 2000 and Biogin 2001 are food adjuncts. The fact that the brochure which describes the products contains a disclaimer regarding any claims of therapeutic value of the products does not alter the conclusion that these products are food adjuncts. They are sold in capsule form with directions to take ''one-half hour before meals.'' 11/16/94.

245.1130 **Chlorella.** Chlorella is a taxable dietary supplement or adjunct. 3/10/71.

245.1132 **Chocolate Chiffon Shake Mix.** The label describes this product as a ''Nutritional Diet with Aloe and Fiber'' and as a meal replacement. The shake, if used as the sole source of nutrition, provides a daily intake of only 270 calories and 33 grams of protein, considerably less than the standard for a ''complete dietary food.'' This product is a dietary supplement the sale of which is subject to tax. 6/17/91.

245.1145 **Diet Octane.** This product is described as a ''nutritional supplement powder'' to help an athlete maintain weight or to help in ordinary weight loss, and thus, is classified as a taxable dietary supplement. 12/12/93.

245.1153 **Dietary Supplementary Fibersonic.** Fibersonic is a powder to be blended with milk to give the liquid a ''milk-shake'' texture. It is designated as a dietary supplement and therefore is excluded from the definition of ''food products'' by Regulation 1602 (a)(5). Its sales are subject to tax. 3/11/91.

245.1155 **Dietetic Cookies.** Retail sales of Estee Assorted Dietetic Cookies are not subject to sales tax. Such cookies are not dietary supplements since they are not ''. . . preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form. . . .'' (Section 6359.) (For the period July 15, 1991 to November 30, 1992, Dietetic Cookies were classified as taxable snack foods which were excluded from the definition of exempt food products.) 10/17/72.

245.1180 **Diet Wafers and Capsules.** Wafers and capsules advertised as high in vitamin content and for use in eliminating hunger sensations normally encountered by persons on reducing diets are not exempt food products. 10/1/57.

245.1200 **Dietary Tablets.** Dietary tablets containing dry milk solids, honey, soy beans, sugar and butterscotch flavoring which are used to reduce hunger sensations are classified as a taxable dietary supplement. 4/7/65.

FOOD PRODUCTS (Contd.)

245.1201 ***Dr. Hagiwara's*** **Products.** *Dr. Hagiwara's* Green Magma, Wheat Germ Extract, Green Essence, and Beta Carrot do not qualify as food products and their sales are subject to tax. They are sold in powdered form and the labels or other product literature accompanying the package containing the products make supplement claims. 9/2/97. (M98–3).

245.1203 **Edge Bars.** The product Edge Bar has been determined to be an exempt food product because it is not in one of the forms to which Regulation 1602(a)(5) applies nor is it described on its package or label as a food supplement, food object, dietary supplement or dietary object, nor designed to remedy specific dietary deficiencies. During the period July 15, 1991 through November 30, 1992 Edge Bars were considered to be ''fabricated snacks'' and sales of them were taxable. 12/14/92.

245.1204 **Encapsulated Bee Pollen.** Encapsulated bee pollen may be classified as a food product in the ''unusual food'' category (Regulation 1602(a)(5)) unless the label states that it is a food supplement or equivalent. Phrases such as ''natural food supplement'' and ''. . . as an addition to the everyday diet'' on the label would prevent the product from being an exempt food product. 1/8/86.

245.1205 **Energy Bars.** (Shaklee) Food bars are listed as food products in Regulation 1602(a)(1) because the Energy Bar is not one of the forms of food products to which the conditions of Regulation 1602(a)(5) apply. Its sales are exempt from tax. (For the period July 15, 1991 to November 30, 1992, snack foods were excluded from definition of exempt food products. There was insufficient information available to determine whether the Energy Bar was a snack food). 11/26/90.

245.1205.5 **Fiber Bars.** Fiber bars are not taxable dietary supplements since they are not preparations in liquid, powdered, granular, tablet, capsule, lozenge and pill form. (Regulation 1602(a)(5)). Fiber bars are food bars, comparable to candy, which is one of the products defined as ''food products'' by Regulation 1602 (a)(1), the sales of which are exempt from tax. 3/11/91.

245.1206 **Gold's Nutritionalysis 100% Pure Milk/Egg Protein Powder.** This is a powdered drink mix described as ''an excellent protein drink supplement.'' Since it is sold as a diet supplement, it is subject to the tax. 10/29/91.

245.1207 **Gold's Nutritionalysis Weight Loss Powder.** This is a powdered drink mix formulated to help promote natural weight loss. Since it only supplies 300 calories and 72 grams of protein per day, its sales are subject to tax. 10/29/91.

245.1208 **Gold's Nutritionalysis High Performance Weight Gainer Formula.** This is a powdered drink mix which is described as a ''concentrated drink mix specially formulated to help maximize weight gain and overall strength.'' It supplies 970 calories and 36 grams of protein per day.

This product does not qualify as an exempt food product under Regulation 1602(a)(5) and, therefore, tax applies to its sale. 10/29/91.

FOOD PRODUCTS (Contd.)

245.1210 **Hoffman's Hi-Proteen.** Hoffman's Hi-Proteen is a taxable food supplement or adjunct. 11/19/71.

245.1212 **Ideal Snacks.** Although made from milk and vegetable sources, this product does not qualify as an exempt food product because its packaging and the enclosed literature clearly describe and laud it as a weight control, calorie reducing meal substitute, and it is sold in tablet form. 12/22/83.

245.1215 **Juice Plus+.** This product provides natural fruit powders, fruit fibers, and food enzymes, along with food actives and acidophilus. Although Juice Plus+ is in capsule form, the label does not state that it is either a food or dietary supplement or adjunct. It also does not indicate that the purpose of the product is to increase, decrease, or maintain the intake of vitamins, minerals, proteins, or calories. Nor does the label make medicinal claims. The supplier states ''. . . being sold as a real food, not a food supplement, vitamin or diet product.'' Therefore, it is considered a food product, the sales of which are exempt from tax under Regulation 1602(a)(1). 12/16/93.

245.1216 **Juice Plus + Thins.** Juice Plus + Thins is sold in tablet form and is described as a food supplement. Therefore, it does not meet the definition of a ''food product'' under Regulation 1602(a)(5) and its sales are subject to tax. 11/18/96.

245.1221 **Lactaid.** According to the manufacturer's brochure, lactaid is a ''natural yeast-derived enzyme which is added to milk to convert its lactose into easily digestible sugars.'' Lactaid, which comes in liquid and tablet forms, is recommended for people who ''have trouble digesting the lactose into milk.'' It is clear from this description that Lactaid is sold as a dietary supplement or adjunct and is not a food product exempt from tax pursuant to Regulation 1602(a)(5). However, Lactaid brand ready-to-drink milk and cheeses qualify as food products and are exempt from sales tax. 12/1/89.

245.1225 **Leppin.** This product is described as the ''ideal quick energy source which promotes physical activity and mental alertness day or night.'' It has all the characteristics of a dietary adjunct. Accordingly, sales of this product are taxable. 4/2/91.

245.1230 **Liquid Chlorophyll.** Liquid Chlorophyll is a liquid herbal product which does not qualify as an exempt ''food product''. This product is a liquid solution supplying 15 mg. per teaspoon of pure water-soluble chlorophyllins derived from the herb alfalfa for which medicinal qualities are claimed. 5/2/91.

245.1232 **Liquid Fat Burners.** This is a liquid product designed for weight loss. Thus, the sales of this product are taxable under Regulation 1602(a)(5). 12/20/93.

245.1240 **MCT Oil.** MCT Oil produced by Mead Johnson & Company is a taxable dietary supplement. 5/16/69.

245.1241 **Medifast and Pro-Call 100.** Medifast and Pro-Call 100 are food products. 9/8/89.

FOOD PRODUCTS (Contd.)

245.1242 **Meritene.** Meritene, a powdered protein supplement, does not contain sufficient calories or protein, by itself, to be considered a complete dietary food. Therefore the sale of Meritene to consumers is subject to tax. 8/30/89.

245.1243 **Metabolic Optimizer.** This is a powdered drink mix which is described as ''a more potent and highly concentrates source of branched-chain amino acids . . . plus energizing carbohydrates and medium-chain triglycerides'' along with vitamins, minerals, etc. It provides only 351 calories and 31 grams of protein per day.

Since it does not supply the required calories and protein per day, it does not qualify as a complete dietary food. Thus, the sales of this product are taxable. 10/29/91.

245.1244 **Met-Rx Bar Product.** A food bar of this type qualifies as a food product under Regulation 1602 since it is not one of the seven forms (e.g., liquid, powder, etc.,) which is excluded from qualification. 6/27/95.

245.1244.025 **Met-Rx Powdered Drink Mix.** This product is sold in powdered form and is described as a food supplement on the label. Therefore, sales or use tax applies to sales of this product. 6/27/95.

245.1245 **Micro Diet Products.** Uni-vite Micro Bar: This food bar is analogous to candy bars which are deemed to be exempt by Regulation 1602, and is therefore exempt.

Micro Muesli, Micro Pasta, Micro Chili, and Micro Soups: These products are in a form traditionally accepted as food products and are exempt even though they may contain a high proportion of powders and are designed to decrease caloric intake.

Micro Drinks: These products are not within the definition of ''food products'' and are therefor taxable. This is a powdered drink mix designed for weight loss or maintenance. Typically, they contain 66 grams of protein and 630 calories and so do not meet the requirements to be a complete dietary food.

Although medicines are not food products, we have previously concluded that, under the proper circumstances, food products may be prescription medicines. If a physician furnishes Micro Diet products as part of a supervised weight loss regime to treat other health problems of a patient, the sale to the patient would be exempt and the purchase by the physician from the product distributor would be exempt as being for resale in the regular course of business. 2/28/91.

245.1246 **Mini Vitamin Tablets.** Mini Vitamin Tablets are described as a ''High-Potency Multi-Mineral Formula'', a dietary supplement. This is a product, in tablet form, described as a dietary supplement. Its sales are subject to tax. 6/17/91.

245.1248 **Monjay.** Monjay is described as a dry yeast. The label claims that the product ''Prevents Garlic/Onion Breath and Aftertaste''; ''Reduces Gas Related Intestinal Discomfort''.

FOOD PRODUCTS (Contd.)

When dry yeast is sold as a dietary supplement or adjunct, or where the label makes specific medicinal claims, the product does not qualify as a ''food product''. Because Monjay makes specific medicinal claims, i.e. prevents halitosis and also relieves gas pains, sales of Monjay are subject to tax. 9/23/91.

245.1250 **Nature's Sunshine Vita Lemon Citrus Tonic Energizer** is excluded from the definition of a ''food product'' under Section 6359. The label states it is for weight loss and medicinal purposes. Although this product is a powdered product with dehydrated lemon juice as one of the ingredients, the presence of fruit juice combined with other products to make a ''preparation'' will not serve to make the preparation exempt from tax if it is otherwise taxable. 5/2/91.

245.1253 **Neo-Life Products.** The following products distributed by Neo-Life Company are dietary supplements or adjuncts the sale of which is subject to tax.

Pro-Snax (tablet form)

Ease Hi-protein (powder form)

Super Ease Hi-protein Food (powder form)

Gloda Hi-protein Powder (powder form). 7/25/75.

245.1263 **Optifast 70 & Optifast 800.** Optifast 70 and Optifast 800 are used as a total meal replacement in connection with a weight loss program. Patients participating in the weight loss program are medically supervised by a physician. Optifast products are available by prescription only and are not available to the general public.

Even though Optifast 70 and Optifast 800 do not qualify as ''complete dietary foods'' under Regulation 1602(a)(5), they do qualify as ''medicines'' under Regulation 1591(b)(1). Accordingly, because these products must be furnished to patient by physicians pursuant to a medically supervised program for treatment of obesity, they are nontaxable under Regulation 1591(a)(2). 3/16/92.

245.1264 **Pathway Meal Replacement Shake.** Pathway Meal Replacement Shake is a product which is mixed with water to be consumed. The mixture is nutritionally balanced and high in fiber and is designated as a dietary supplement for the purpose of weight management. Therefore, it is excluded from the definition of ''food products'' by Regulation 1602 (a)(5), and its sales are subject to tax. 3/11/91.

245.1268 **Pollen, Royal Jelly & Forever Bee Propolis.** Where bee pollen products are sold in tablet form, they are, if sold as food supplements or weight-loss aids, excluded from the term ''food products'' and their sales are subject to tax. 6/17/91.

245.1268.300 **Power Bar.** Power Bar is a candy bar or cookie fortified with vitamins and minerals. As such, it is a tax exempt food product under Regulation 1602. 5/30/90.

245.1269 **Probioplex.** Probioplex is a powdered product described as a dietary supplement. Sales of this product are subject to tax. 6/5/91.

FOOD PRODUCTS (Contd.)

245.1270 **Pro-Life Protein Formula 96.** Tax applies to the sale of Pro-Life Protein Formula 96, because it is sold as a protein dietary supplement rather than an exempt ''food product.'' 12/7/77.

245.1280 **Protesoy** is a dietary supplement or adjunct, not exempt food product, and sales of it are subject to tax. 4/14/69.

245.1283 **Re-Vita Liqua Health.** Re-Vita Liqua Health is a food or dietary supplement the sales of which are subject to tax. 8/4/92.

245.1284 **Sea Fish Oil Capsules.** Sea Fish Oil Capsules label states that this product provides a rich source of Omega-3 fatty acid and olein acid and that supplementation with Arctic-Sea capsules is an excellent way to increase your polyunsaturated fat intake. Since this capsule product is labeled as a food supplement, its sales are subject to tax. 6/17/91.

245.1285 **Shakes.** This is usally a powdered drink mix sold for the purpose of weight loss or maintenance. Such drinks are powdered products produced or designed to decrease caloric intake and are excluded from the definition of a ''food product''. Their sales are subject to tax. 9/16/91.

245.1286 **Shaklee Products—Taxable.** Shaklee Instant Protein Drink Mix is a taxable food supplement. 11/27/91.

245.1287 **Shapelite.** Shapelite's label designates this product as a source of high quality protein. It does not supply enough calories or protein to be a complete dietary food. Therefore, it is excluded from the definition of ''food products'' under Regulation 1602(a)(5), and its sales are subject to tax. 3/1/91.

245.1288 **Slim Fast and Ultra Slim Fast Powdered Mix.** Slim Fast and Ultra Slim Fast Drink Mix sold in powdered form are taxable dietary supplements. Since the label states that the product is sold for the purpose of aiding weight loss these products are excluded from the definition of a food product pursuant to Regulation 1602(a)(5). 10/31/84; 12/31/90; 6/17/91.

245.1290 **Slippery Elm Herbal Tea.** Slippery Elm Herbal Tea sold in capsule form does not qualify as an exempt food product. Food products do not include preparations in capsule form that are sold as dietary supplements or adjuncts. 9/27/76.

245.1292 **Solid Mass.** This product is a powder which must be mixed with milk to be consumed. It is designed to aid in the intake of calories and to help the athlete gain weight and so it is a dietary supplement, the sales of which are subject to tax. 12/12/93.

245.1293 **Somatogain.** The label identifies Somatogain, which is in powdered form, as a dietary supplement. The label further states each serving contains 156 calories and 0 grams of protein, and contains the statement: ''Not a significant source of fat, cholesterol, dietary fiber, vitamin A, vitamin C, and iron.''

Based on the nutrition facts listed on the label, this product does not contain sufficient amounts of protein, calories, and other vitamins and minerals for it to

FOOD PRODUCTS (Contd.)

be considered a complete dietary food as that term is defined in Regulation 1602. Therefore, its sales are subject to tax. 07/01/96.

245.1295 **Spirulina.** Spirulina, a type of seaweed, qualifies as a food product, provided it is not labeled as a food supplement or dietary adjunct, or make any claims concerning medicinal or dietary benefits. Like kelp, Spirulina labeled as a dietary supplement would not be considered a food product and its sale would be taxable. 6/1/89.

245.1296 **Spirulina Plankton.** Spirulina Plankton is a dehydrated vegetable aquatic organism in powdered form. It is a food source containing up to 71 percent vegetable protein, vitamins, minerals, trace elements, and chlorophyll. Regulation 1602 provides that ''. . . unusual foods such as brewer's yeast, wheat germ, and seaweed are not subject to tax unless their label states they are a food supplement or the equivalent.'' As such Spirulina Plankton is a food product unless the label claims medicinal benefits or calls itself a food supplement. 4/27/81.

245.1305 **"Stay Fit Nutri-Tabs" and "Stay Fit" Powdered Formula.** ''Stay Fit Nutri-Tabs'' consist of vitamin enriched ''chewable tablets.'' The suggested use of the tablets is as a supplement to or a replacement for the ''Stay Fit Shake'' and the label indicates the product can be used for a weight loss program. It also indicates that there are 60 calories and four grams of protein in each serving of six tablets.

''Stay Fit'' Powered Formula is to be mixed with nonfat milk or unsweetened juice to make a ''shake'' like drink which ''contains the elements necessary for proper nutrition including vitamins, minerals, herbs and hipo-aids.'' The label indicates that the product can be used in conjunction with other food products (fish, poultry, vegetables) for a weight loss program. It also indicates that there are 60 calories and 10 grams of protein in each serving.

Both ''Stay Fit Nutri-Tabs'' and ''Stay Fit'' powdered formula do not qualify as ''food products'' as that term is defined under Regulation 1602. Although the labels from these products do not specifically state that the products are food supplements or adjuncts, the labels nevertheless do indicate that these products are designed to encourage weight loss in the user by decreasing the caloric intake. (Regulation 1602(a)(5)(B).

Furthermore, both ''Stay Fit Nutri-Tabs'' and ''Stay Fit'' powdered formula do not provide the user with a sufficient amount of calories and protein in the recommended daily dosage to qualify as nontaxable ''complete dietary food'' under Regulation 1602. Tax applies to the sale or use of ''Stay Fit Nutri-Tabs'' and ''Stay Fit'' powdered formula since these products are sold in powdered and tablet form as dietary supplements or adjuncts and are not therefore ''food products'' exempt from tax under Regulation 1602. 3/7/86.

FOOD PRODUCTS (Contd.)

245.1328 **Taxable Supplements.** The following products are subject to tax when sold at retail.

Wow
Focus
Be Your Best!
Go For It!

2/3/94.

245.1330 **Taxable Vitamins and Food Supplements.** Each of the following items are sold with a claim of providing medical benefits. As such, sales of these products are excluded from the definition of food products and are subject to tax:

Aller-Comp No 824 P.S.E.,
Herbal Flavoroids No 829,
DGL 840,
Kan Kleer No 809,
Fem Care No 819,
Arbution Complex No 802A,
Silymarin Complex No 801A,
Silymarin-7X No 801,
Adren-Ade No 827,
Powdered Extract Ginko Bilboa,
Folia (8:1), and
Esialation No 821

12/31/91.

245.1355 **ToppFast Diet Plan Meal.** ToppFast Diet Plan Meal are powders which must be mixed with water to be consumed. It is described as ‘‘a delicious, nutritious, metabolically-balanced diet meal. It has been developed by a physician who has medically supervised thousands of fasting patients under clinical conditions’’. The two labels that were furnished included a chicken soup and a vanilla drink.

Diet products, such as dehydrated soup are food products. As such, sales of the soup are exempt from tax. The drink mix is a powdered product, and the label states that it is sold for weight loss purposes. Therefore, sales of the drink mix are subject to tax. 8/8/91.

245.1360 **Yeast.** When yeast is prepared in dried, flaked, powdered, or tablet form, it is sold primarily as a dietary supplement or adjunct, that is pasteurized and the live yeast cells are killed in the process. While some yeast in this form may be used in food preparations, if yeast in such form is sold principally for use as a dietary supplement or adjunct it must be regarded under the statute and regulation as other than a food product for human consumption as therein defined. 7/24/52.

245.1362 **Yohima.** Yohima products are described as supplements which give ‘‘increased strength, endurance and power’’ and are sold in liquid and tablet form. They are dietary supplements, the sales of which are subject to tax. 12/20/93.

FOOD PRODUCTS (Contd.)

245.1364 **Finhalsa.** Finhalsa is a food bar, not in liquid, powdered, granular, tablet, capsule, or pill form. It is similar to a candy bar and is within the definition of ''food product,'' except that during the period of July 15, 1991 to November 30, 1992 such products were taxable as fabricated snacks. 4/18/91.

245.1366 **Food For Life Drink Mixes.** Food for Life drink mixes, including Festive Eggnog and Chocolate Dessert, are not food products because they are in powdered form, the labels identify them as weight loss products, and they do not contain sufficient nutrients to be classified as a complete dietary food as that term is used in Regulation 1602(a)(5). 4/24/91.

245.1367 **Food For Life Soups and Cereals.** Food for Life soups and Super Oats cereal are food products because both categories are specified as such in Regulation 1602(a)(1), even though they may be in dehydrated form when sold. 4/24/91.

245.1368 **Heavyweight Bulk-Up.** This is described as an anabolic weight-gain product and is a powder designed to be mixed with either milk or water to be consumed. It is a dietary supplement, the sales of which are taxable. 12/20/93.

245.1369 **Herbal Teas.** Herbal teas for which medicinal qualities are claimed do not qualify as exempt food products. Teas made by the Yogi Tea Company (Yogi Teas Ancient Healing Formula) contains claims that the teas have general healing properties.

The following teas are not exempt food products: Enchinacea Fitness Tea, Ginger Tea, Easy Lax Tea, De Tox Tea, Cold Season Tea, Calming Tea, Breathe Deep Tea, Bedtime Tea. 3/30/95.

245.1370 **Bee Pollen.** The following products are considered as exempt food products since they are not described on their labels as food supplements.

(1) Whole Grain Bee Pollen

(2) Kid-Bees Bee Pollen

(3) Bee Pollen Tablets

(4) Bee Propolis

The following products do not qualify for the ''food product'' exemption since capsule or granular forms are described on the label as dietary supplements.

(1) Royal Energizer—Royal jelly for the Lady

(2) Royal Energizer—For Men

(3) Weight-Bee-Ter—All Natural Diet System. 9/28/64.

245.1373 **Minerals, Enzymes, Extracts.** The products listed below are supplements or adjuncts. Their sales are subject to the sales or use tax:

Essential Minerals

Multi-enzymes

Neutral C+

FOOD PRODUCTS (Contd.)

OPC Grape Seed Extract
Powerjuice Fruit Juicecaps
Powerjuice Vegetable Juicecaps. 7/24/95.

(c) CANDY AND CONFECTIONERY. (Taxable July 15, 1991 to Nov. 30, 1992)

245.1380 **Glaced Fruit.** Glaced fruit normally is considered as a confection and subject to tax. If, however, it is used in cooking food product, such as a fruit cake, it would be exempt. The type of package in which it is sold, such as a plain box with cooking directions on it would be evidence that it was sold for cooking purposes rather than as a confection. 6/24/53.

245.1400 **Maraschino Cherries.** Maraschino cherries sold in bottles are normally regarded as exempt food products. However, when sold as a candied or glaced fruit they are subject to tax unless sold for cooking purposes. 3/24/53.

(d) SPECIFIC PRODUCTS

245.1410 **Advance.** Advance is a nutritional beverage which is specifically formulated to meet the total nutritional needs of older babies. This product is recommended for use either as a supplement to mother's milk, or as an alternative to cow's milk. Thus, Advance qualifies as a food product and, its sales are not subject to tax. 7/30/84.

245.1411 **All-Sport Body Quencher.** This product is a food product, sales of which are exempt, although it contains trace amounts of carbonation. Sports energy drinks are generally recognized as falling into the general food products category. 2/28/97.

245.1412 **Ashitaba Percent Powder and Tablets.** Manufacturer's sales brochure for ''Ashitaba Percent'' powder and ''Ashitaba Percent'' tablets includes descriptions of the products as ''vegetable supplements'' that are ''approved by the medical and pharmaceutical field in clinical laboratories to have exceptional nutritional value contained in the element chalcones which is essential to good health.'' The brochure also contains statements that it ''helps strengthen the immune system, lowers cholesterol, balances the pH, and aids in preventing ulcers and many other ailments;'' that ''chalcone actually prevents and slows down the growth of cancer cells.'' Furthermore, the brochure states ''there is a lot of vitamin B12 contained in the element of the ''Ashitaba'' and ''vitamin B12 activates brain cells, increases concentration.''

The Board has previously concluded that promotional literature is part of the labeling or packaging of the product that the literature describes. Therefore, even if ''Ashitaba Percent'' product label did not describe it as a food supplement, if the promotional literature continues to describe the product as a food supplement, the product will be considered as described on its package or label as a food or dietary supplement or adjunct. Based on this information, both of these products are excluded from the definition of ''food products'' by subdivisions (a)(4) and (a)(5) of Regulation 1602. 3/29/96.

FOOD PRODUCTS (Contd.)

245.1415 **Calistoga Juice.** Calistoga Juice, which has carbonation, is classified as a carbonated beverage, even though it contains natural fruit juices. Thus, sales of Calistoga Juice are subject to tax. 5/31/90.

245.1415.225 **Correctol 100% Herbal Tea Laxative.** This product is a medicine and therefore excluded from the term ''food product'' under Regulation 1602 (a)(4). 9/5/96.

245.1415.250 **Crystal Geyser Sparkling Mineral Water.** This product is a carbonated beverage and, thus, it is not a food product. Sales of this product are subject to tax. 4/28/97.

245.1416.350 **Diet Products and Energy Products.** Oat Cake is a food product despite its use as a diet aid.

Snapple Diet Ice Tea is a food product. The reference to ''diet'' merely refers to the artificial sweetener. 3/3/95.

245.1416.450 **Dr. Chen's Secret Sauce.** This is a barbecue sauce described as made from all natural ingredients. This item qualifies as a food product and its sales are exempt from tax. 4/7/94.

245.1416.500 **Dried Seaweed, Algae, and Wheatgrass.** These products are sold in powdered form. Dried seaweed, algae, and wheatgrass in powdered form are exempt food products provided that the label or packaging makes no claim to the products' medicinal or curative qualities or to a dietary benefit. 8/23/93.

245.1416.800 **Efficon.** Efficon is a liquid formula taken to improve male sexual performance. The product label gives detailed instructions to the dosage, how to be swallowed, and how often to be taken. A detailed warning is given as to circumstances when the user should decrease the dose, discontinue the dose, or simply not take it at all. Efficon is advertised on the label as a treatment or mitigation for male sexual problems, and as previously sold under prescription. Efficon is, therefore, being marketed as having medical qualities. Accordingly, when Efficon is sold over-the-counter, its sales are not exempt from tax under section 6369. 1/28/98. (M99–2).

245.1417 **Evergreen.** This is a liquid product which is added to another liquid in order to be consumed. It is designed to help fortify the blood with added zinc and minerals. This product not only is designed to increase the body's intake of minerals but also is making specific medicinal claims. Sales of this product are subject to tax. 4/7/94.

245.1418 **Fibermed.** ''Fibermed'' biscuits are substantially a cereal product described as a ''high fiber supplement.'' Since they are not in liquid, powdered, granular, tablet, capsule, lozenge, or pill form, their sales are not subject to tax. 5/22/86.

245.1419 **Food For Life Products.** Food For Life soups and cereals are exempt as food products since soup and cereals are listed in the regulation as food products and these products are not designated as food supplements or adjuncts.

FOOD PRODUCTS (Contd.)

Food For Life drinks and shakes are powdered products and the labels describe them as food adjuncts for the purpose of weight loss. These products are excluded from the term ''food products'' and are taxable.

Food For Life meal replacement bar is an exempt food product. The bar is not one of the forms excluded from exemption by Regulation 1602(a)(5). 6/6/91.

245.1420 **Food Products—Exempt.** The items listed below qualify as exempt food products under section 6359.

''Food Products'' include all fruit juices, vegetable juices and other beverages, including all beverages composed in part of fruit or vegetable juice, except: carbonated water, carbonated beverages, spirituous, malt, or vinous liquors. The exemption applies whether the beverages are in liquid or frozen form, and includes all powders, concentrates or other bases for exempt beverages.

Beginning December 1, 1992, ''Food Products'' include all noncarbonated and noneffervescent bottled water and medicated and nonmedicated gum.

During the period July 15, 1991 to November 30, 1992, noncarbonated and noneffervescent bottled water and all chewing gum were excluded from the definition of food products for human consumption.

For period prior to July 15, 1991, sales of noncarbonated and noneffervescent bottled water were exempt only if the individual containers were one-half gallon or more in size. Also, only nonmedicated gum was included in the definition of ''Food Products''.

Accent 1/11/50
Amway's Nutrilite Food Bar 5/23/78
Bitters:
- Angostura 10/24/56
- Orange 10/24/56
- Orange Flower Water 10/24/56
- Peychaud 10/24/56

Brandied Fruit and Nuts 2/2/53
Brandied Mince Meat 10/31/58
Caltrol 7/27/60
Cocktail Mixes:
- Bloody Mary 8/7/64
- Mai Tai 8/7/64
- Scarlet O'Hara 8/7/64

Beachcomber Brand
- Daiquiri 11/5/65, 9/20/66
- Fog Cutter 11/5/65, 9/20/66
- Mai Tai 11/5/65, 9/20/66
- Margarita 11/5/65, 9/20/66
- Navy Grog 11/5/65, 9/20/66
- Scorpion 11/5/65, 9/20/66

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FOOD PRODUCTS (Contd.)

Tahiti Joe's Brand
Daiquiri 3/31/66
Mai Tai 3/31/66
Margarita 3/31/66
Navy Grog 3/31/66
Pink Daiquiri
Planters Punch
Scorpion
Volcano
Zombie
Vita Pakt Citrus Products Co.
Collins Mix 11/15/65
Daiquiri Mix 11/15/65
Don the Beachcomber 11/15/65
Margarita Mix
Gimlet Mix
Margarita Mix
Screwdriver Mix
Whiskey Sour Mix
Dextrogen 2/6/52
Diced Citron 10/31/58
Dietene 5/6/60
"Duets" 10/19/56
D-Zerta 2/3/60
Enfamil Liquid 10/29/59
Enfamil Powder 10/29/59
Ensure 10/31/84
Ensure Plus 10/31/84
Fudge and Icing Mix 4/4/55
Hot Buttered Rum Batter 11/20/63
Hy Pro 2/6/52
Instant Control 7/3/61
Instant Sereno 10/10/55
Korean Ginseng Products 12/12/77
Sustagen 3/21/60
Mile High Instant Food Fortified 1/16/56
Nature's Favorite 6/14/61
Nestle's Quik Shake 2/7/67
Nutrament 5/1/63
Pam 8/14/69
Teas:
Mate, an Argentine tea 12/10/53
Toddy 12/21/51
Yeast, Active Dry:
Fleischmann's 8/12/52. (Am. 2000–1).

FOOD PRODUCTS (Contd.)

245.1430 **Food Products—Snack Foods, Candy and Confectionery.** During the period July 15, 1991 to November 30, 1992, ''Food Products'' excluded snack foods, candy, confectionery and nonmedicated chewing gum as such were taxable. Beginning December 1, 1992, these items are exempt food products and tax does not apply.

''Snack foods'' means:

Cookies
Crackers (excluding soda, graham, and arrowroot crackers)
Potato chips
Snack cakes and pies
Corn or tortilla chips
Pretzels
Granola snacks (i.e. bars and squares)
Popped popcorn
Fabricated chips
Fabricated snacks

''Snack foods'' include only items that are sold in a form suitable for consumption without further processing such as cooking, heating, or thawing.

''Snack foods'' does not include:

Ice cream, milk and milk products
Vegetables, including dehydrated vegetables
Fruit and fruit products
Baby foods
Doughnuts, breads, pastry, and other bakery products (other than cookies, crackers, snack cakes and pies)
Nuts, nut meats and seeds
Unpopped popcorn
Cereals
Meat and meat products
Beef jerky and similar dried meat products
Natural pork skins

"Fabricated snacks" means snacks made from components, including food components, which are processed and formed. This includes items such as grain cakes, shoestring potato snacks, food bars or squares, and extruded snacks such as curls, twists and puffs. The term does not include ''meal replacement bars'' which supply per serving (as defined by the manufacturer), at least 250 calories and 25% of the U.S. RDA of vitamins and minerals (as established by regulations of the United States Food and Drug Administration).

"Snack cakes and pies" means cakes or pies which are baked or fried in individual serving sizes or cut and pre-wrapped or pre-packaged for subsequent sale in individual serving sizes, whether sold individually or packaged together. A package of single-serving items is subject to tax. Large whole cakes and pies are not taxable. Snack cakes or pies which are prepackaged in individual serving sizes are taxable. Slices of cakes or pies which are packaged to go at the time of the sale are not subject to tax.

FOOD PRODUCTS (Contd.)

Crackers are thin crisp wafers or biscuits, usually made of unsweetened dough. Bread items such as flat breads, matzo bread, break sticks and toast are not crackers. Crackers specifically excluded from the definition of snack foods are soda (saltines), graham and arrowroot crackers.

Baking Goods. Products which may be considered a confection but are packaged and marketed for sale as cooking or baking products, such as baking chocolate, marshmallows and glazed fruit are exempt.

Mixed Products. Products pre-packaged in individual serving sizes which contain a mixture of both food products and candy or snack foods (e.g. trail mixes, cheese & crackers) are taxable regardless of the ratio of food products to candy or snack foods. Packages which are not in single serving sizes but contain a mixture of both food products and candy or snack foods are taxable if 50% or more of the mixture contains snack foods or candy.

Combination Packages. The application of tax to combination packages which contain both food products (e.g. fruit) and nonfood products (e.g. snack foods, wine or toys) will depend upon the essential character of the complete package. If more than 10 percent of the retail value of the complete package, exclusive of the container, represents the value of the nonfood merchandise, a segregation must be made and measured by the retail selling price of such nonfood merchandise. Examples of products requiring such a segregation would be (1) the sale of a box containing a bottle of wine, a package of crackers, wedges of cheese and fruit or (2) cereal containing a prize or toy.

Candy & Confectionery includes chocolate-coated nuts, candied fruits, crystallized fruits and glazed fruits. Preparations of fruits, nuts or cereals in combination with chocolate, sugar, honey, candy or other confectionery are taxable unless sold for baking purposes. The method used in packaging and distributing these preparations, inclduing the kind and size of container used, will be considered in determining the primary use for which these preparations are sold.

Labeling. If the term ‘‘snack’’ is used in the name of a product or on its label, the product will be presumed to be taxable unless it is clearly excluded from the definition of a ‘‘snack food’’.

The following examples of taxable and exempt items have been determined by the Board of Equalization to be consistent with the changes in statutory law concerning snack foods, candy and confectionery.

Sample Taxable Items

Ak-mak Sesame Crackers
Almond Joy
Almond Cookies
Almond Roca
American Classic Minced Onion Crackers
Artificial Pork Skins (i.e. made from grain products)
Bagel Chips

FOOD PRODUCTS (Contd.)

Bama Pecan Pies (individual size)
Bavarian Pretzel
Bean Chips
Bolands Cream Crackers
Bolands Snap Crackers
Breath Mints
Bremner Cracked Wheat
Brown Rice Chips
Brownies (individually prepackaged)
Bubble Gum
California Diet Energy Bar
Candied Apples
Carmel Popcorn
Carnation Breakfast Bars
Carrs Water Biscuit
Cheese 'n Crackers
Cheese Puffs
Cheetos
Cheezits
Chico Popcorn Cakes
Chico Rice Cakes
Chico San Cheddar Popcorn
Chocolate Bars
Chocolate Chip Cookies
Chocolate covered fruit and nuts
Chocolate covered grahams
Cinnamon Animal Crackers
Combos Snacks
Corn chips
Cracker Jacks
Cupcakes
Diet Cookies
Ding Dongs
Dolly Madison Zingers
Doritos
Durkee French Fried Potato Sticks
Estee Sugar Free Candy
Fi-bars
Fiddle Faddle
Fig Newtons
Figurines
Flavortree Cheddar Sticks
Flavortree Party Mix
Fortune Cookies
Fruit Gems
*Fruit Roll-ups

FOOD PRODUCTS (Contd.)

Funyons
Gamesa Animalitos
Ginger Snaps
Graham Cookies
Graham Cookies with creme fillings
Granny Goose Bugles
Granola Squares
*Grist Mill Sharks
Gum
Gummi Bears
Hain Sesame Crackers
Hain Vegetable Crackers
Hain Rice Cakes
Hapi Crazy Mix
Hapi Soy Bits
Hapi Tokyo Mix
Harvest Day Fruit Pies (individual size)
Hershey Bars
Hershey Granola Bars
Hostess Ding Dongs
Hostess Sno-Balls
Hostess Suzy Q's
Jack La Lane Granola Bars
Jelly Beans
Keebler Tato Skins
Keebler Toasted Midley Crackers
Keebler Deluxe Graham Cookies
Keebler O'Boisies
Kelloggs Nutri Grain Bars
Kudos
Lemon Drops
Licorice
Life Savers
Lu Little School Boy Cookies
M & M's
Macaroons
Marie Lu Original Biscuits
Matzo Crackers
Moms Cookies
Nabisco Heydey Bars
Nabisco Marshmallow Twirls
Oatmeal Cookies
Onion Flavor Rings
Oreos
Peak Frean Tea Biscuits
Peanut Butter 'n Crackers

FOOD PRODUCTS (Contd.)

Pepperidge Farms Cheddar Goldfish
Petit Fours
Pik-nik Fabulous Fries
Pillsbury Figurines
Potato Chips
Pretzels
Pringles
Quaker Chewy Granola Bars
Reeses Peanut Butter Cups
Ritz Crackers
Sandwich Cookies
Screaming Yellow Zonkers
Sesame Snack Sticks
Shoestring Potato Snacks
Stella D'Oro Breakfast Treats
Stella D'Oro Pfeffernuesse
Sugar Cookies
Tic Tacs
Toffee Peanuts
Tortilla Chips
Tootsie Rolls
Trail Mixes with carob (individual serving sizes)
Trail Mixes with glazed fruit (individual serving sizes)
Triscuit
Truffles (candy)
Turnovers
Twinkies
Weight Watcher Bars
Wel Pac Shrimp Chips
Yogurt covered nuts & fruit
Zingers

* Taxable Effective 4-1-92

Sample Exempt Items

Ak-mak Armenian Cracker Bread
Apple Chips
Arrowroot Crackers
Baby Biscuits
Bagels
Baking Chocolate
Bear Claws
Beef Jerky
Beer Nuts
Bread
Break Sticks
Cakemate Candy Cake Decorations
Carnation Slendar Bars

FOOD PRODUCTS (Contd.)

Carrot Chips
Cheese
Chicharones (made from meat products)
Cinnamon Rolls
Corn Nuts
Cream Puffs
Dolly Madison Gem Donuts
Donuts (large or small)
Dried Fruit
Eclairs
Fried Pork Skins (made from meat products)
Fruit Juices
Gatorade
Gerber Baby Pretzels
Glazed Fruit for baking
Graham Crackers (cinnamon, honey, & shapes)
Granola Cereals
Hershey Semi Sweet Chocolate Chips
Honey Roasted Nuts
Hye Roller Soft Cracker Bread
Ice Cream
Lunchables
Marshmallows (baking product)
Matzo Bread
Meat
Melba Toast
Microwaveable Popcorn
Muffins
Nestles Butterscotch Morsels
Nuts
Pastries
Pepperoni Sticks
Pizza Rolls
Poptarts (requires further processing—heating)
Popsicles
Pudding
Ralston Chex Snack Mix
Ryvita Crispbread
Seeds
Soda Crackers (saltines) low fat, no salt, and wheat
Strudel
Unpopped Popcorn
Valley Lahvosh Cracker Bread
Wasa Crispbread
Zwieback Toast

2/10/92.

FOOD PRODUCTS (Contd.)

245.1440 **Food Products—Taxable.** The items listed below do not qualify as exempt food products under section 6359.

"Food Products" include all fruit juices, vegetable juices and other beverages, including all beverages composed in part of fruit or vegetable juice, except: carbonated water, carbonated beverages, spirituous, malt, or vinous liquor. The exemption applies whether the beverages are in liquid or frozen form, and includes all powders, concentrates or other bases for exempt beverages.

During the period July 15, 1991 to November 30, 1992, "food products" excluded candy and confectionery, and "snack foods." Noncarbonated and noneffervescent bottled water and chewing gum were excluded from the definition of food products for human consumption.

For periods prior to July 15, 1991, sales of noncarbonated and noneffervescent bottled water were exempt only if the individual containers were one-half gallon or more in size.

Acidaphilus 3/19/58
All-Purpose Gelatin (Dietary Supplement) 8/5/60
Apple Cider, hard 8/22/55
Bone Meal Tablets 7/27/60
"Cal-Protein" 8/23/54
Coloring, food 4/30/54
Glutamic Acid 7/27/60
Herbal Laxatives 3/13/52
Naturslim 8/8/77
Oral Protein Supplement 8/2/51
Powdered Kelp 10/6/59
Revall's Instant Protein (Dietary Supplement) 2/15/61
Roma 8/22/50
Special Food Supplement 12/21/61
Tryosine 7/27/60
Veg-Amino Mineral Mix 5/31/68
Veg-O-Ready 5/6/57 (Am. 99–2).

245.1446 **Fortune Delight.** This product is described as having herbal ingredients. If the label does not make specific medicinal claims for the product or designate it as a food supplement, it qualifies as a food product the sales of which are exempt from tax. 4/7/94.

245.1480 **Herbal Medicines (Teas).** The following listed herbs are well-known as herbal medicines and, as such, do not qualify as food products. The sales of these products are subject to tax:

- Chamomile—used as an antispasmodic or a diaphoretic.
- Valerian—used as a carminative and sedative.
- Echinacea—used for treatment of ulcers and boils.
- Goldenseal—used as an alternative and a toxic.
- Immiosi—Tea—mixture of medical herbs. 5/31/94.

FOOD PRODUCTS (Contd.)

245.1483 **Hops Used in Brewing Beer.** When breweries are the consumers of the beer they produce, ingredients which are food products are exempt even though incorporated into a taxable beverage. Such ingredients as sugar, corn grits, soy bean flakes, etc., are food products meeting this test. Hops are considered a flavoring extract and therefore a food product. Chemical additives are not food products and are subject to tax. 9/26/69. (Am. 2000–1).

245.1487 **Ideal Snacks.** Ideal Snacks is a product derived entirely from vegetable sources and milk by-products and is sold in tablet form. A review of the product guide and marketing literature revealed that this product has several recommended uses. The primary recommended use is for weight control, i.e., either weight loss or weight gain.

The product literature clearly shows that Ideal Snacks is designed and prescribed to decrease the user's calorie intake. In light of this evidence, Ideal Snacks does not qualify as a food product and the sale and use of this product is subject to tax. 12/22/83.

245.1489 **Isomil.** Isomil is a powdered, milk free baby food which is used as the only source of nutrients if the infant is unable to ingest milk or dairy products. Sales of Isomil are exempt as a food product. 1/4/89.

245.1492 **Juice Plus & Lite.** The literature for "Juice Plus & Lite" identifies the product as a food supplement. Further, the label and brochures characterize the product as a weight management product, designed to decrease generally the intake of calories, and as a unique blend designed to increase generally the intake of vitamins, minerals, and proteins. Thus, the product is excluded from the definition of "food product" by subdivision (a)(5)(A) and (B) of Regulation 1602. 6/25/96.

245.1497 **Lecithin.** This product is sold in whole, bulk form. Lecithin is a food product whose sale is exempt provided that the label or package makes no claim of medicinal qualities or indication that the product is sold as dietary supplement or adjunct. 8/23/89.

245.1500 **Medicinal Claims for Herbal Tea.** Rubina, an herbal tea for which medical claims are made in a sales brochure, does not qualify as a food product whose sales are exempt. 11/23/94.

245.1520 **Mil-Kee-Whey.** This product is a whey based food beverage drink composed principally of dairy whey, nonfat dry milk, milk protein, and corn syrup. The label does not describe it as a food supplement nor does it make any medicinal or weight loss claims. Mil-Kee-Whey is a food product the sale of which is therefore exempt from tax. 1/23/84.

245.1530 **Mineral Oil.** Mineral oil is not a food product even though consumed by humans. It has no nutritional value and is not broken down by the digestive system. Its use is for medicinal purposes and therefore its sales are subject to tax. 7/17/56.

FOOD PRODUCTS (Contd.)

245.1545 **Modifit.** Modifit consists primarily of nonfat dry milk solids, fructose, calcium casinate, cocoa, soy bean oil, multodextrin, egg white solids, and a number of vitamins and minerals. This product is a complete dietary food and, therefore, qualifies as an exempt food product. 5/11/84.

245.1588 **Nature's Sunshine Products.** The following named products of Amtec Industries, Inc., marketed under the Nature's Sunshine Product label were found to be food products although they are sold in capsule form because the label makes no claims that would make them food or dietary supplements or adjuncts. They generally are used as spices or seasoning, or to make teas or soups. They are all within the classification of ''unusual foods'' under Regulation 1602(5):

Black Walnut
Chickweed
Combination GRH-X
Garlic
GingerAlfalfa
Gotu Kola
Kelp
Licorice Root

Concentrated chickweed, alfalfa, and black walnut are also within the definition of unusual food. 9/28/82.

245.1600 **Natures Treasures International Products.** The following products are ''unusual foods'' pursuant to Regulation 1602 (a)(5) since these products are not described on their labels as food supplements or the equivalent. As such the sales of these products are not subject to tax:

Whole Grain Bee Pollen

Kid-Bees Bee Pollen

Bee Pollen Tablets

Bee Propolis

The following products do not qualify as food products since they are sold in liquid, powdered, granular, tablet, capsule, lozenge, or pill form and are described on their labels as dietary supplements or adjuncts. Therefore sales of these products are taxable:

Royal Energizer

Royal Energizer for Men

Weight-Bee-Ter 9/28/84.

245.1616 **Onion International Iris Herbs and Herbal Products.** The following are unusual foods and qualify as food products for human consumption. As such, tax does not apply to the sale or use of the following products:

FOOD PRODUCTS (Contd.)

Super Energy (Item #201–30)
Natural Energy Plus (Item #205–30)
Kola Nut (Item #202–30)
Nature Trim 100 (Item #401–30)
Cy-Nus (Item #807–30)
FE-30 (Item #803–30)
HRPEZ (Item #810–30)
Colon Clenz (Item #811–30)
Skin Care (Item #813–30)
CCF (Item #912–60)
Lifeforce III B (Item #604–30B)
Lifeforce III C (Item #604–30C)
Sod Ginseng (Item #605–30)
STRS (Item #606–30)
Beet Powder (Item #607–60)
Herb Kal (Item #608–60)
Nature Trim 200 (Item #1402–30)
Nature Trim 102 (Item #1403–30)
Lifeforce (Item #601–30)
Lifeforce PM (Item #402–30)
Lifeforce III (Item #604–30)
Mead Pak (Item #601–30)
Nature Calm (Item #602–30)
CFY (Item #603–30)
Arth-Ry-Tus (Item #804–30)
AL-R-G (Item #606–60)
Arth-Ry-Tus Pan (Item #805–60)

The following items are described on its label as a ''food supplement'' and they do not qualify as exempt food products. Tax applies to the sale or use of the following products:

079 Spiruline
077 Spiruline Ginseng
026 Lifeforce Junior. 2/16/84.

245.1620 **Osmolite.** Osmolite is an isotonic liquid food which is designed for patients who are particularly sensitive to hyperosmotic feeding, and can be used for the total or supplemental nutrition by oral feeding. The principal ingredients are water, hydrolyzed corn starch, sodium and calcium casenates, coconut oil, and soy protein.

Since Osmolite is not sold as a dietary supplement or adjunct, it comes within the definition of a ''food product'' as provided under section 6359. 3/7/84

245.1630 **Pedialyte.** Sales of Pedialyte are nontaxable. 5/29/96.

245.1632 **Pedialyte and Other Dehydration Products.** The following products are nontaxable food products:

Pedialyte® Oral Electrolyte Maintenance Solution—Freezer Pops
Naturalyte® Oral Electrolyte Solution
Infalyte® Oral Electrolyte Maintenance Solution
Kao Lectrolyte™ Electrolyte Replenisher (power packets)
Isomil® DF Soy Formula For Diarrhea. 5/16/97.

245.1633 **PediaSure.** When a product coming within the general definition of food product is labeled as a supplement, it is excluded from the definition of food unless qualifying as a complete dietary food for purposes of subdivision (a)(5) of

FOOD PRODUCTS (Contd.)

Regulation 1602. It was previously concluded that Ensure and products substantially identical in labeling and content to Ensure qualify as complete dietary foods. PediaSure is labeled for use by children aged 1 to 10 and has slightly less nutritional content than does Ensure. If PediaSure's label were consistent for use by adults, its nutritional content would be insufficient to be regarded as a complete dietary food. However, when used as labeled, PediaSure has at least the same nutritional value for children aged 1 to 10 as does Ensure for adults, which is consistent with its labeling that it can be used for "total nutritional support." As such, PediaSure qualifies as a food product, sales of which are exempt from tax. 9/9/99. (2000–2).

245.1635 **P.V.M. Weight Reduction Plan.** P.V.M. is described on its label as "the P.V.M. Weight Reduction Plan . . . a High Protein Powder with vitamins and minerals . . . A formulated meal replacement when added to orange juices or low-fat milk . . . ."

The P.V.M. Weight Reduction Plan does not qualify as a "food product." It is described on its label as a "weight reduction plan" and is designed to increase vitamin and mineral intake and decrease caloric intake. Accordingly, tax applies to the sale of this item. 8/1/78.

245.1700 **Samana #9.** According to the manufacturer's promotional materials, "Samana #9 is a total food concept which incorporates one-third of the National Research Council recommended daily allowances for all the essential nutrients in a 20-gram serving or meal . . . . If taken as directed, this product supplies all the U.S. Recommended Daily Requirements to vitamins, minerals and protein."

Since it is designed to be a complete food product, Samana #9 qualifies as a food product whose sales are not subject to tax. 7/22/77.

245.1705 **Simply Nutritious Mega C.** This is a noncarbonated fruit juice that has been fortified with vitamin C. Since the product is not sold or marketed as a medicine, and the label does not indicate it is a food or dietary supplement or adjunct, this product is a food item sales of which are exempt from tax. 3/16/98. (M99–2).

245.1709 **Slender Now.** Slender Now is a program consisting of the following four different products:

(1) Slender Now Formula 1: An exclusive formula, protein drink.

(2) Slender Now Formula 2: An exclusive vitamin and mineral formula.

(3) Slender Now Formula 3: A special vitamin B6 dietary supplement in a base of food supplements.

(4) Slender Now Formula 4: A blend of oils, high in essential polyunsaturated fatty acids.

According to its informational pamphlet, the "Slender Now" program is designed to "regulate carbohydrate intake, arrest hunger pangs, and, . . . provide various essential daily nutrient." Formula 1 is "designed to be used as an aid in Dietary Weight Control which includes caloric restriction."

FOOD PRODUCTS (Contd.)

Formula 2 and 3 appear to be vitamin supplements. Formula 4 is designed to be added to Formula 1 and also as a salad preparation.

Under the definition of food products in Regulation 1602, Slender Now would not be considered a food product. Formula 1 is designed specifically to decrease caloric intake, Formulas 2 and 3 are essentially vitamin and mineral supplements, and Formula 4 is a dietary adjunct since it is designed to be added to Formula 1 once a day. 7/22/77.

245.1716 **Sun Bars.** This is an individually-wrapped ''granola-type'' food bar which is considered a food product and, thus, its sale is not subject to tax. 4/7/94.

245.1720 **Sundance Natural Juice Sparkler.** This product is carbonated and contains only 70% fruit juice. As such, its sale is taxable as a carbonated beverage. 11/13/89.

245.1740 **Sunny days.** This is a mouthdrop which is for the purpose of freshening breath. Sales of this product are subject to tax. 4/7/94.

245.1780 **Sustacal.** Sustacal is a nutritionally complete food in liquid form and may be used either as a meal substitute or taken as a person's sole source of nutrition. This product qualifies as a food product and, therefore, its sales are not subject to tax. 7/30/84.

245.1820 **Tom and Jerry Batter and Eggnog Batter.** Tom and Jerry Batter and Eggnog Batter are exempt food products even though their principal use is as ingredients of alcoholic drinks. The batters themselves are made of ingredients which are themselves food products and they are ultimately intended for human consumption. Accordingly, the sales of these products are exempt as food products for human consumption. 12/1/50.

245.1830 **Trader Joe's Lecithin Granules.** These are sold in a one pound bag. No claim has been made regarding this product. The label states only the name of the product, the weight, the nutritional value of one tablespoon, and the caloric count per gram.

Lecithin Granules are not considered ''food products.'' They are a dietary or food supplement designed to remedy specific dietary deficiencies consisting of ingredients which have been specially mixed or compounded for the purpose of providing a high nutritional source. Tax applies to the sale of Lecithin Granules. 6/5/78.

245.1835 **Trader Joe's Pure Natural Bee Pollen.** It is sold in a four ounce bag. No claim is made regarding this product. The label states only the name of the item and the weight.

''Bee Pollen'' is not a food product when the label on the product indicates that the product is for medicinal purposes. In this case, no claims are made as to this product's uses. Rather, it is simply a food sold for human consumption. As such, this product is considered a food product and exempt from tax. 6/5/78.

FOOD PRODUCTS (Contd.)

245.1900 **Vantage Plus.** Vantage Plus is a powder that can be mixed with other foods and beverages. The label from Vantage Plus states that the product is ''A Complete Meal Replacement,'' and that it can be used as a ''nutrition enhancer'' or ''nutritious alternative.'' Furthermore, its label does not indicate that it is designed to increase or decrease user's vitamin, protein or caloric intake, nor is it described as a dietary or food supplement. Thus, Vantage Plus is a food product under Regulation 1602 and its sales are not subject to tax. 10/1/84.

245.1904 **Vitalite Snacks.** The label describes this product as ''Dried Seasonal Fruits and Vegetables.'' Dehydrated foods generally are considered as ''food products'' the same as their regular form. Thus, sales of these products are exempt from tax. 4/7/94.

245.1910 **"Wine without Alcohol".** ''Wine Without Alcohol'' is 99.51% alcohol free and is not carbonated or effervescent.

Although this wine product would not be considered an alcoholic beverage pursuant to section 23004 of the Business and Professions Code, for sales and use tax purposes such products are considered wine notwithstanding their containing less than 0.505% alcohol. This product falls within the category of spirituous or vinous liquors because it is the fermented juice of the grape and contains alcohol. Sales of this beverage are not sales of food products under Regulation 1602. 7/31/86.

245.1920 **Wonder Bee Royal Jelly and Kiku Royal Jelly.** Royal jelly falls into the category of ''unusual food'' as long as the label does not describe it as a ''food supplement'' or the equivalent. Accordingly, Wonder Bee Jelly is a ''food product'' since its label and the accompanying literature does not describe it as a dietary food supplement. On the other hand, Kiku Royal Jelly is labeled as a ''nutritional dietary food supplement''. Therefore, it does not qualify as a food product and its sale is subject to tax. 10/25/89.

245.2010 **Yu Xiao San—Herbal Medicine.** The label on this herbal product states that it is formulated to control blood sugar. Therefore, this product is a ''medicine'' rather than a food product under section 6359 and Regulation 1602(a)(4). Sales of medicines are exempt from tax only if one of the conditions required by Regulation 1591(a) is met. Over-the-counter sales of medicines are not included. Consequently, such sales of Yu Xiao San are subject to tax. 2/26/97.

245.2100 **Zbar.** This product is marketed as ''part of your diabetes dietary management regime . . . a clinical study . . . shows Zbar may regulate blood glucose levels up to nine hours in many people.'' It appears that Zbar is designed to regulate blood sugar levels and is a ''medicine,'' not a food product or dietary supplement. Thus, although it is in bar form, its sale is taxable unless sold in a manner which would entitle the sale to be exempt as a ''medicine.'' Over-the-counter sales of the products are subject to tax. 2/24/97.

FOREIGN COMMERCE
See Interstate and Foreign Commerce

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250.0000 FOREIGN CONSULS—Regulation 1619

(a) SALES TAX

250.0005 **Argentine Diplomatic Corp.** A taxpayer makes sales of marine fuel to the Argentine Diplomatic Corporation. The fuel is used for operation of Argentine Navy vessels. The sale is taxable unless the purchaser can establish it is entitled to an exemption by furnishing the tax exemption card issued by the U.S. Department of State. 2/9/95.

250.0025 **Corporation Owned by Foreign Government.** A taxpayer is a corporation, organized under the laws of the Commonwealth of Australia, and solely owned by the Australian government. Under Internal Revenue Code section 892, this corporation would be treated as a foreign government for United States tax purposes. The question was posed if this corporation would be considered a foreign government under the California Sales and Use Tax Law.

California does not have an equivalent code section or regulation to Treasury Regulation section 1.892–2T. California makes no distinction between corporations owned or controlled by foreign government and any other corporation. (See Annotation 250.0190 (07/25/90).)

Accordingly, if the corporation makes sales of tangible personal property at retail in this state, or stores, uses or otherwise consumes tangible personal property purchased from a retailer for use in this state, the corporation would not be exempt from the application of the Sales and Use Tax Law in California. Further, sales to the corporation are not exempt from sales tax. 7/15/96.

250.0050 **Federal Republic of Germany.** The consulate general of the Federal Republic of Germany requested the Board to issue its tax exemption cards to foreign nationals who are employees (clerks and secretaries), not diplomatic officers, of the consulate. These employees' applications listed their visa status as ''immigrant.''

''Immigrants'' are generally aliens who seek permanent residence in the U.S., with the possibility of later becoming citizens, as contrasted with alien nonimmigrants who seek only a temporary stay in the U.S., with no intention of abandoning their country of residence. (8 U.S.C.A. section 1101 (a)(15)).

The multilateral Vienna Convention on Consular Relations to which the U.S. and Germany are parties, in summary exempts consular employees from certain taxes, including state sales and use taxes, except when consular employees are permanent residents of the receiving country unless the receiving country so provides. (Articles 49 and 71, Vienna Convention on Consular Relations, U.S. Treaties and other International Acts Series No. 6820).

With respect to German nationals, the U.S. has done so under Article XIX of the 1925 U.S.-German treaty. Therefore, tax exemption cards should be issued to the consulate general's employees as requested. This is based on the fact that immigrants to the U.S. do not lose their status as foreign nationals, nor do they acquire status as U.S. nationals even though the immigrants have become permanent residents of the U.S. under their immigrant visas. 12/6/83.

FOREIGN CONSULS (Contd.)

250.0060 **Foreign Students.** Sales tax applies to sales of books and merchandise to foreign students by University of California students' store, even though paid for through the embassies in Washington, D.C. 10/1/63.

250.0070 **Mission Tax Exempt Card.** The Mission Tax Exemption Card provides an exemption from the sales or use tax for tangible personal property sold to foreign consular officers, employees, or members of their families. (Regulation 1619.) However, in the case of a construction contract between the owner of the building occupied by a foreign consular officer and the contractor, the sale is being made to the owner of the building rather than to the foreign consular officer. Accordingly, the Mission Tax Exemption Card does not provide an exemption to any taxes imposed with respect to the construction contract. 1/28/94.

250.0075 **Olympic Games.** The California Legislature has made no concessions or special exemptions from tax regarding equipment to be used in the Olympic Games. Participating teams fully sponsored by foreign governments are not immune from California taxes. The exemption applicable to certain consular officers, Regulation 1619, does not extend to Olympic teams. 4/26/83.

250.0080 **United States Providing Purchase Money.** Sale of the vehicle to a foreign government's representative, with the United States Government furnishing the purchase money through AID, is taxable because the sale is not a sale to the United States Government. Even though foreign governments are exempt from payment of use tax, the sale to the foreign government is still taxable since the tax is on the retailer and not on the consumer. The sale cannot qualify as an exempt sale in interstate or foreign commerce, despite the representative's intention of shipping the vehicle to the foreign country, because delivery of the vehicle was made to the foreign government's representative in the state. 10/14/69.

250.0095 **Sales—Consular Officers Serving in Third Country.** California sales tax does not apply to the sale of tangible personal property to consular officers and their families residing in the state, pursuant to treaty or other diplomatic agreement. However, sales in California to foreign consular officers serving in a country other than the United States are not exempt. 8/6/76.

250.0097 **Taiwan Diplomats.** In 1979, governmental relations between the United States and the governing authorities of Taiwan were terminated. Congress then passed the Taiwan Relations Act to promote the continuation of commercial, cultural, and other relations between the United States and the people of Taiwan. A nonprofit corporation called the American Institute in Taiwan was established

FOREIGN CONSULS (Contd.)

and functions much like a foreign embassy. The Act exempted the Institute from any taxes imposed by any state or local taxing authority. Pursuant to the Act, the U.S. Department of State issues a Tax Exemption Card to members of the Institute stating that the holder is exempt from all sales taxes.

Since the State Department has identified the members of the American Institute in Taiwan as immune from state and local taxation pursuant to the Taiwan Relations Act, neither sales nor use tax applies to the sale or use of personal property sold to Taiwan Diplomats holding a Tax Exemption Card issued by the U.S. Department of State. 1/12/89.

250.0099 **Tax Exemption Card Withdrawn.** When the U.S. State Department has withdrawn the tax exemption cards of the personnel at a foreign government consulate's office due to differences in treaty interpretations, purchases by such personnel will be subject to sales tax. 6/8/87.

(b) USE TAX

250.0110 **Foreign Air Carrier—Corporation Not Wholly Owned By A Foreign Government.** A foreign corporation which is substantially an air carrier, but not wholly owned by a foreign government, is not exempt from use tax. Thus, it is not treated any differently than any other person for purposes of Section 6009.1 which requires that the properties be purchased "for use solely outside the state". 5/10/90.

250.0120 **Foreign Airline Company.** The imposition of the use tax on spare aircraft parts installed in this state for a foreign airline company is not in violation of tax reciprocity agreements under treaties between the U.S. and France. The treaties were signed long after the imposition of a use tax by this state and the tax is not discriminatory, being imposed to the same extent on domestic aircraft companies. 4/1/65.

250.0140 **Government-Owned Foreign Airline.** A foreign airline company, a public corporation formed and substantially owned by a foreign government, is liable for use tax measured by the purchase price of spare aircraft parts purchased outside California and shipped into California for storage and installation, as needed, where tax treaties between the United States and the foreign government grant no immunities from state use taxes. However, parts later transshipped to points outside for installation are exempt. It is immaterial that such parts,when purchased, were not specifically intended or earmarked for storage and installation in California. 6/8/64, 7/15/64.

250.0150 **International Organizations.** While neither sales nor use tax applies to books and documents purchased from foreign governments, international organizations are not regarded as foreign governments but as entities separate and apart from the constituent member states. Generally, there are no exemptions or exclusions for sales made by international organizations.

However, the United Nations is unique in that, by treaty, it is not required to pay sales tax on its sales transactions. The treaty immunity, however, does not shelter purchases from the United Nations from the California use tax because the

FOREIGN CONSULS (Contd.)

use tax is imposed directly on the purchasers. Thus, purchases made from the United Nations are subject to use tax. 6/8/90.

250.0190 **Person.** The definition of ''person'' in Sales and Use Tax Law Section 6005 includes corporations but not foreign governments. However, there is no distinction between corporations partially or wholly owned by a foreign government and any other corporation publicly or privately owned. It also makes no exception for existing corporations which are ''nationalized'' by foreign governments.

Any possible immunity from use tax by virtue of treaties between the United States and the foreign governments owning such corporations is a matter of evidence, with the person claiming exemption having the burden of proof to cite the specific treaty and provision which supports immunity. 7/25/90.

250.0200 **Purchases From Foreign Governments.** The use tax does not apply to purchases from foreign governments for the reason that they are not ''persons'' as defined in Section 6005 and the purchases, therefore, are not made from a ''retailer.'' 12/23/54.

250.0220. **Purchases From International Organizations.** Generally, there are no exemptions in the Sales and Use Tax Law for sales made by international organizations. They are not regarded as foreign governments, but as entities separate and apart from the constituent member states.

The United Nations is unique in that it is not required to pay sales tax on its sale transactions. This is because the United Nations is expressly immune from direct taxation, by treaty. However, the treaty immunity of the United Nations does not shelter purchasers from the California use tax, because the use tax is imposed directly on the purchaser. Thus, purchases made from the United Nations are subject to use tax.

Also, tax does apply to sales made by, or purchases made from, organizations whose members are states to the United States, i.e., sales made by the Multistate Tax Commission. 6/8/90.

FOREIGN GOVERNMENTS
See Foreign Consuls

FORM
Substantial change in, see Leases of Tangible Personal Property—In General.

FORWARDING AGENTS
See Interstate and Foreign Commerce.

255.0000 FOUNDRIES—Regulation 1530
See also Property Used in Manufacturing.

255.0020 **Carbon or Graphite.** Where scrap carbon or graphite is added to the charge in addition to the normal coke charge, and is used solely to add carbon to the iron and is not used as a fuel, the sale of the scrap carbon or graphite would be exempt from tax as a sale for resale. If, however, any portion of such scrap

carbon or graphite does in fact oxidize or burn and, therefore, provide heat which aids the manufacturing process, that proportion would be considered as sold for consumption as in the case of the 55% of the coke considered used by Regulation 1530. 7/19/55; 9/16/87.

FRACTIONAL INTEREST
Transfer of, see Tangible and Intangible Property.

FRATERNAL ORGANIZATIONS
See Nonprofit Organizations; Taxable Sales of Food Products.

FREIGHT CARS
Rail, exemption of, see Interstate and Foreign Commerce.

FUEL
See Motor Vehicle and Aircraft Fuels.

260.0000 FUR DRESSERS AND DYERS—Regulation 1531

260.0020 **"Curtrilin V,"** used in bating operation constituting first step in tanning sheep skins, does not become physically incorporated into the processed article. 4/3/51.

260.0040 **"Neutrigan"** used in the tanning of leather does not substantially become a part of the finished leather and, as such, is a manufacturing aid subject to sales tax. 2/18/55.

260.0060 **Salt** used in tanning hides is not purchased for resale, being largely removed in the tanning process. 7/17/57.

260.0080 **Santotan KR** is a basic chrome sulphate used in the tanning of leather and becomes a component part thereof which may be purchased ex-tax for purpose of resale. 6/26/53.

260.0090 **Tanasol PW and Nopco 1525.** "Tanasol PW", a synthetic tannin (syntan), incorporated in tanned leather and may be purchased by the tanner for resale. "Nopco 1525," an oil emulsifier used to degrease the leather, is a manufacturing aid, the sale of which to the tanner is subject to sales tax. 8/24/72.

265.0000 FUR REPAIRERS, ALTERERS AND REMODELERS—Regulation 1549

FURNITURE REUPHOLSTERERS
See Reupholsterers.

G

275.0000 GAS, ELECTRICITY AND WATER

(a) DELIVERY THROUGH MAINS, LINES OR PIPES

275.0020 **Air for Aqua Lung.** Although the tax applies to sales of air previously compressed into cylinders delivered to the purchaser, the tax does not apply to the charge for servicing aqua lungs with compressed air where the customer furnishes the aqua lung and the taxpayer merely furnishes the services of his compressor. 7/17/59.

275.0021 **Air for Aqua Lung.** The taxpayer purifies air by using a compressor to pump air through several processing steps, and then stores the purified air in storage tanks. The taxpayer then fills its customer's empty scuba tank with the purified air from its storage tank. The taxpayer is not providing a nontaxable service of merely compressing air, which is free to all, into the customer's scuba tank. Rather, it is selling tangible personal property, that is, air that it has captured and which it owns. The sale is subject to tax. 8/24/72. (Am. M98–3).

275.0030 **Air and Water Through Vending Machines.** A taxpayer is engaged in operating self-service gas stations. Taxpayer has on the premises coin operated vending machines attached to an air compressor and water line. The air and water are not purified or filtered in any way nor are there storage tanks to hold water or air. The machines will dispense either air or water for approximately three and one-half minutes on the insertion of 25H.

The sale of the air and water through the coin operated vending machine is nontaxable. The sale of the water is within the exemption provided by Section 6353. The sale of the air, in this factual situation, is incidental to the furnishing of the services of the air compressor (see Anno. 275.0020). 8/10/87.

275.0040 **Bottled Water.** The exemption in Section 6353 pertains only to water delivered through mains or pipes and so does not apply to bottled water. 8/26/64.

275.0060 **Butane and Propane Gas.** Sales of butane and propane gas delivered through pipes come within the exemption of Section 6353. If, however, the property sold is in liquid form when it passes through a meter to a consumer, the exemption does not apply even though the meter might show the amount passing through the meter in terms of an equivalent quantity of gas. 3/28/55.

275.0080 **Butane and Propane—Meters.** When liquefied butane or propane gas is delivered by a vendor into his tank located on the customer's premises and the tank is attached to the customer's pipes, the existence of a meter of any type is not essential to the obtaining of the exemption provided in Section 6353, but is an evidentiary aid in determining who has title to any particular time.

The existence of a meter which measures gas flow would indicate an exempt sale, but if the contract and billing indicate a sale of liquefied gas, the existence of a meter would not prevent the tax from applying. 7/20/59.

GAS, ELECTRICITY, ETC. (Contd.)

275.0085 **Butane Produced During Refining Process.** During the refining process, a taxpayer produces butane and propane from crude oil which it has purchased. Some of the butane and propane is transported back inside the refinery through pipes for use as fuel in the refining process.

The mere fact that the butane and propane is transported back in house through pipes does not qualify the gasses for exemption. The taxpayer is not delivering the gas to a consumer as required by Section 6353. Also, the crude oil which petitioner purchased is a liquid not a gas. 5/6/93.

275.0100 **Butane-Propane Gas.** Sales of butane-propane gas, which flows from the vendor's storage tanks and meters belonging to vendor but installed on vendee's premises are exempt sales where gas subsequently flows through customer's pipes. 1/30/52.

275.0120 **Compressed Air.** Air compressed in cylinders or tanks and sold for use in diving operations is subject to tax. If a separate rental is charged for the cylinders or tanks, the amount of such separate charge is not taxable upon the assumption that the tax was paid when such containers were originally purchased. 5/19/55.

275.0127 **Compressed Natural Gas.** A utility delivers natural gas through its lines to a gas compressor which boosts the pressure and pumps the gas into high pressure storage cylinders, thus creating Compressed Natural Gas (CNG). The CNG subsequently is injected directly into vehicles through a fueling post. The sale of the CNG is exempt pursuant to section 6353. 12/20/90.

275.0133 **Compressed Natural Gas (CNG).** The sale of Compressed Natural Gas delivered through a distribution system to a fueling station (from gas line to public dispenser) for sale to consumers as motor vehicle fuel is exempt from sales tax under section 6353. 5/9/91.

275.0136 **Container Furnished by Customers.** A person selling water from a water system to customers who furnish their own containers is not selling taxable bottled water but water sold through mains, lines, or pipes within the exemption in section 6353. 9/27/91.

275.0140 **Delivery Into Customers' Tank Trucks.** Where a water company delivers water from its system through a meter on a hydrant into customers' tank trucks, the exemption of Section 6353 applies. The water is being delivered to the customers through mains, lines or pipes. It is immaterial that the customers take delivery into tank trucks rather than into household piping systems. 1/24/78.

275.0150 **Delivery of Water Through Vending Machine.** The delivery of water through a vending machine qualifies as a sale through a water main without regard to whether the premises where the vending machine may be located is or is not served by water mains and without regard to the fact that the person selling through the vending machine may or may not be the utility servicing the vending machine. 4/6/92.

GAS, ELECTRICITY, ETC. (Contd.)

275.0160 **Fuel Oil.** Fuel oil delivered through pipes and used for the same purpose as gas, is not included in the term ‘‘gas’’ and accordingly is subject to sales tax. 5/29/53.

275.0170 **Fuel Oil Exchanged for Steam.** The exemption under Section 6353 does not extend to the sale of fuel oil when transferred to acquire exempt steam and electricity. This type of transfer is an exchange sale of the fuel oil in which the measure of the sale cannot be less than the amount of credit allowed for the refinery fuel provided. The fact that the product received in exchange was steam or electricity, the sale of which is exempt under the provisions of Revenue and Taxation Code Section 6353 is of no consequence. 6/25/91.

275.0171 **Geothermal Energy.** A natural resource development company owns geothermal resources. The company drills the wells and supplies the geothermal fluid to the power plant operator. This is accomplished in the following manner.

The fluid in the ground is brought to the surface through pipes and is delivered by the resource company to the power plant operator. The fluid, in the form of hot brine, remains in liquid form (‘‘binary technology’’) and flows through a heat exchanger to heat and vaporize a ‘‘working fluid,’’ typically hydrocarbon. The vaporized working fluid then turns the turbine generator which produces electricity.

The geothermal fluid that is used to vaporize the working fluid is passed to the resource company which injects it into the reservoir through another well.

The piping and pumps on the land of the resource company are owned by the resource company, and piping and pumps on the land of the power plant operator are owned by the power plant operator.

Under these circumstances, sales tax does not apply to charges made by the resource company to the power plant operator pursuant to provisions of section 6353. 2/10/81.

275.0175 **Oxygen Sold Via Pipes.** Taxpayer owns and operates an oxygen production facility located on real property owned by a manufacturer of glass containers. The taxpayer produces oxygen and sells it in vapor form to the glass manufacturer via pipeline. The taxpayer owns a segment of the pipeline from the junction point to the glass manufacturer’s building. Title to the oxygen furnished is transferred to the glass manufacturer at the junction point. The taxpayer meters the oxygen as it enters the pipeline on its way to the glass manufacturer’s furnace.

In this case, the taxpayer is making sales of gaseous oxygen by delivering that oxygen to the purchaser via pipes. Such sales are exempt from sales tax under section 6353. 9/11/95.

275.0175.100 **Oxygen Used as a Fuel.** The sale of oxygen used as fuel in a coal gasification plant delivered through a metered pipeline from an oxygen generating facility outside of, but near, the gasification plant qualifies for exemption under section 6353 provided the customer is billed only for the metered amount and the oxygen is in gaseous form when delivered to the customer. 7/31/84.

GAS, ELECTRICITY, ETC. (Contd.)

275.0175.500 **Propane.** A sale of propane delivered to the customer through a tank at the customer's location qualifies for the exemption provided by section 6353 only if the seller retains title to and possession of the propane until the propane is delivered in vapor form to the customer's premises through mains or pipes. This occurs only where the seller controls the tank, as discussed below, and where the contract contains an explicit provision whereby the seller retains title to the propane until it is delivered into the customer's premise in a gaseous form. When the sale satisfies these conditions, it is exempt from tax.

Where a customer leases the tank from either the seller or some other person, or where the customer owns the tank (and does not lease it to the seller as discussed below), the sale of propane is subject to tax because the sale of the propane occurs upon delivery into the tank, while in liquid form. A seller controls the tank only where it owns the tank (and does not lease it to the customer or a third party) or it leases the tank from the customer. If the seller leases the tank from the customer, it must be a bona fide lease, and the seller cannot increase its charge for the propane to recover its cost of leasing the customer's tank. If it does so, the ''lease'' will be disregarded and the sale will be regarded as having occurred no later than when the propane is placed in the tank in liquid form, regardless of any title provision in the contract to the contrary.

If the sale satisfies the conditions for exemption discussed above, pre-billing the customer for the amount of liquid propane delivered into the tank, with a credit upon termination of the contract for any propane remaining in the tank, will not affect that exemption, nor will calculating the charge for the propane by converting the amount of liquid gallons delivered into the tank to cubic feet for purposes of billing. 2/6/97.

275.0175.750 **Residential Use.** The phrase ''for general household use in his or her residence . . . '' in section 6353 is a restriction for the exemption pertaining to sales of water sold in quantities of 50 gallons or more and does not similarly restrict the exemption pertaining to the sale or use of propane or any other type of gas. 7/31/97. (M98–3).

275.0180 **Steam.** Sales of steam delivered through pipes or mains are exempt under Section 6353. 1/18/65.

275.0200 **Water Carried by Barges.** Water delivered to ships at anchor by means of barges is not delivered through mains, lines or pipes within the meaning of Section 6353 merely because the water is pumped through a hose or other connecting link between the barge and the ship at anchor. 4/6/51.

275.0220 **Water Carried by Tank Trucks.** A water company delivers water by its own tank trucks to its storage tanks on a customer's premises with title to the water in the storage tanks retained by the water company. The water is then pumped through demineralization tanks and into the customer's pipe system to outlets, and the customer is charged on the basis of readings on a meter installed on the tanks. Since the water is delivered to the customer through pipes at its premises, the sale of the water is exempt under Section 6353. 8/11/66.

GAS, ELECTRICITY, ETC. (Contd.)

275.0245 **Water Through Vending Machines.** Vending machines dispensing water from its own storage tanks, rather than from mains, lines, or pipes connected to the municipal water supply, do not come within the exemption of Section 6353. Thus, the sales are subject to tax. 9/30/91.

275.0260 **Water Withdrawn from Canals.** Sales of water which is delivered to contractors by canals are exempt from tax within the meaning of Section 6353, since canals and laterals may be considered as mains, lines, or pipes within the meaning of the statute. The withdrawal of the water from a designated location under a water service rate schedule by the contractor is considered a delivery. However, if the water is trucked to the contractor by the seller, the transaction is taxable. 8/5/64.

(b) WATER ADDITIVES

275.0280 **Chemicals.** The following chemicals added to water which is resold remain in the water and may be purchased ex-tax:

calcium hypochlorite	sodium hydroxide	
quick lime	hydrated lime	
chlorine	sodium hypochlorite	
soda ash	lime	
copper sulfate 4/9/64	sodium silicofluoride	11/21/62.

275.0300 **Aluminum Sulfate.** Ninety-one percent of the aluminum sulfate used in treating water remains in solution and is sold along with the water, so that sales of the aluminum sulfate to the water supplier are exempt sales for resale. 11/29/62.

275.0320 **Anhydrous Ammonia, Ammonium Sulfate, and Sodium Chlorite.** These chemicals may be purchased ex-tax when purchased for treatment of water by a water service company. 6/19/63.

275.0340 **Chlorine** added by a city to its water supply for the purpose of destroying undesirable micro-organisms and objectionable chemical substances becomes part of the delivered product as chloride ions and is bought for resale; consequently, a resale certificate may be furnished to the chlorine supplier even though the sale of the water itself is exempt from sales tax. 5/4/60.

275.0360 **Diatomaceous Earth.** The sale of diatomaceous earth to a water treatment plant is taxable where the product is used as a filtering agent to remove impurities and does not dissolve or become part of the water. 4/27/64.

275.0400 **Ferric Sulphate** sold for use in treating a water supply, is an exempt sale for resale. 10/4/65.

275.0420 **Sodium Chloride** may be purchased ex-tax for resale where it is used in a water softening process whereby its sodium ions are incorporated in the water. 9/5/62.

GAS, ELECTRICITY, ETC. (Contd.)

275.0440 **Sodium Fluoride and Hexameta Phosphate.** These chemicals are exempt from sales tax when purchased for resale as water additives in a municipal water system. 4/30/63.

275.0460 **Sodium Hexameta Phosphate.** This chemical improves water for consumption in that it prevents calcium from reacting with soap and often is added as a ''softener'' and as such is a valuable, incorporated component of the water sold and is not subject to tax. Similarly, lime and soda ash are added to water to aid in the removal of calcium and magnesium by raising the pH and since the sodium hydroxide ion has the virtue of keeping the water slightly alkaline it is purchased for resale and not subject to tax. 5/21/62.

(c) COGENERATION TECHNOLOGY

275.0500 **Cogeneration Technology.** The exemption in Section 6353 of the Sales and Use Tax Law was expanded to include ''. . . exhaust steam, waste steam, heat, or resultant energy, produced in connection with cogeneration technology, as defined in Section 25134 of the Public Resources Code.''

In 1981, the Legislature rewrote Section 25134, repealing the definition of ''cogeneration technology'', and replacing it with a definition of ''cogeneration''.

The rule of statutory construction applicable here is that a statute (Sec. 6353) which adopts by reference another statute (Sec. 25134) is unaffected by amendment or repeal of the latter statute (Sec. 25134) in the absence of express or implied legislative intent to the contrary. There was no express or implied legislative intent to the contrary in the 1981 amendment (Stats. 1981 Ch. 952 Sec. 5).

Therefore, in interpreting Section 6353, the Board staff will use the following definition of ''cogeneration technology'' from Section 25134 as originally enacted; no effect will be given to the 1981 amendment.

''Cogeneration technology'' means the use for the generation of electricity of exhaust steam, waste steam, heat, or resultant energy from an industrial, commercial, or manufacturing plant or process, or the use of exhaust steam, waste steam, or heat from a thermal powerplant for an industrial, commercial, or manufacturing plant or process. For purposes of this division, the industrial, commercial, or manufacturing plant or process shall not be considered a thermal powerplant or portion thereof. Cogeneration technology shall not include steam or heat developed solely for electrical power generation. 12/29/83.

280.0000 GIFTS, MARKETING AIDS, PREMIUMS AND PRIZES—Regulation 1670

See also Trading Stamps and Related Promotional Plans.

280.0020 **Advertising Material.** Advertising material purchased by local dealers from their out-of-state manufacturer is subject to tax. 7/7/53.

280.0040 **Advertising Material—Gifts.** Advertising or promotional material shipped or brought into the state and temporarily stored here prior to shipment outside state is subject to use tax when a gift of the material made and title passes

GIFTS, MARKETING AIDS, ETC. (Contd.)

to the donee in this state. When the donor divests itself of control over the property in this state the gift is regarded as being a taxable use of the property. 10/11/63.

280.0060 **Advertising Material—Gifts.** Advertising or promotional material shipped or brought into this state is subject to use tax when a gift of the material is made and title passes to the donee in this state. An out-of-state company, using its own trucks, transports the advertising and promotional materials of its affiliated California retailer from a point outside California to the United States Postal Service (USPS) in this state. The USPS delivers the materials to potential customers who receive the promotional materials for no consideration. In this case, the California retailer divests itself of control over the property at the point where the merchandise is delivered by the out-of-state company, on behalf of the California retailer, to the USPS in this state. The delivery to the USPS constitutes the completion of a gift since the advertising or promotional material is distributed free of charge to the donees. The act of giving the material away at no charge is a use in this state and such use is taxable. 3/28/02.

280.0080 **Advertising Material—Post Cards.** The California use tax does not apply to amounts paid to an out-of-state direct mail advertising firm for post cards mailed from out-of-state to California customers. 11/22/55.

280.0100 **Advertising Materials and Catalogs.** Where a foreign corporation ships advertising materials to the office, branch, or salesman of such out-of-state corporation in this state, at which point they are used or distributed, the use tax applies to the cost of the material to the corporation. If the corporation itself manufactures the materials, the cost of the raw materials is the taxable amount.

In the case of catalogs, the printing charge made by the printer would be the taxable amount, together with any other charges such as covers, binding, etc. 4/26/56.

280.0160 **Beer Can Openers,** furnished by breweries to retailers with beer, are not regarded as ''self consumed'' by the breweries. 10/2/50.

280.0180 **Book Matches.** Where a restaurant furnishes its patrons with book matches advertising the restaurant, some of which are furnished with purchases of cigarettes, while others are sometimes taken gratis by diners, the restaurant may purchase the same ex-tax as for purpose of resale.

Thereafter, match books sold with cigarettes as a premium article will be considered included in the sales price of the cigarettes. Those given away to noncigarette purchasers are considered self-consumed. 9/30/53.

280.0185 **Bookmarks Sold For $2.00 "Postage And Handling".** A taxpayer located in California offers a bookmark to customers for a $2.00 charge, designated as postage and handling. Most of the orders received for the bookmark are from out of state.

Assuming that the charge for the bookmark is 50 percent or more of its cost, the taxpayer is considered to be selling the bookmarks rather than consuming them (Regulation 1670 (b)). Accordingly, when a bookmark is sent to a

California customer through the U.S. Mail, the amount of postage shown on the package is considered to be a nontaxable transportation charge. For example, when a bookmark is sent to a California customer, if the postage on the envelope is shown as 25 cents, then the taxable gross receipts from the transfer is $1.75. If the bookmark is mailed to a customer located outside California, tax does not apply to any of the $2.00 charge. 12/5/88.

280.0187 **Contributions for Gifts.** A nonprofit organization with IRS section 501(c)(3) status is embarking on a solicitation campaign. Each contributor will be offered a selection of various gifts determined by the amount of contribution. That is, the larger the contribution, the larger the ''gift.'' The gift will be delivered by a representative in California to the contributor.

Generally, items furnished for a suggested donation are regarded as sold for purposes of sales and use tax. (See annotation 495.0370, 10/16/72). However, under certain circumstances where there is a significant disparity between the amount of the contribution and the retail value of the property received, only part of the amount of the contribution will be included in the measure of tax. For example, when (1) a person makes a contribution and receives tangible personal property upon making the contribution, (2) the primary purpose of the contribution is to make a donation to support the charity, and (3) there is a significant disparity between the amount of the contribution and the retail value of the property received in connection with the contribution, there is a sale of tangible personal property, but the measure of tax is the sales price of the property to the nonprofit organization. If the nonprofit organization had paid sales tax reimbursement or use tax on its purchase of the property, no further tax would be due. If the nonprofit organization purchased the property for resale, the sales tax is due on the nonprofit organization's purchase price of the property when it resells it. The nonprofit organization may collect sales tax reimbursement from its contributors if the contract of sale so provides. 3/7/96.

280.0190 **Car Wash.** A ''free'' car wash which accompanies a taxable sale of gasoline is not a ''premium'' as defined by Regulation 1670(c) because it is not tangible personal property. The gross receipts from the sale of the gasoline cannot be reduced by the value of the intangible service given. 10/10/72.

280.0200 **Cash Discounts—Punchcards—Cash Prizes.** Punchcards were purchased by a grocery store, which distributed them to customers and nonpurchasing visitors. Cards could be redeemed by customers after making $100 of purchases, as indicated by punches on the cards or cards could be redeemed by nonpurchasing visitors by accumulating weekly ''free'' punches. Upon redemption each customer or visitor received a cash prize of $1 to $100, the amount designated under a seal on each card, which was opened by a store employee. The store was the consumer of the punchcards. The amounts of such cash prizes were not cash discounts, inasmuch as receipt of such amounts did not necessarily depend on the recipient having made any purchases and the amounts received bore no relation to the amount of purchases actually made by a customer recipient. 9/21/64.

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GIFTS, MARKETING AIDS, ETC. (Contd.)

280.0201 **Casino Gifts.** A California taxpayer purchases merchandise from a supplier in Utah. The taxpayer sells the merchandise to casinos in Nevada. The casinos give the merchandise away as promotional items. Some of the merchandise is shipped directly by the Utah supplier to the Nevada casinos. Some merchandise is shipped by the Utah supplier directly to casino patrons, some of whom reside in California. Some merchandise is shipped to the taxpayer in California who subsequently ships it to the Nevada casinos.

Merchandise shipped to Nevada or directly to California casino patrons by the Utah supplier is not subject to tax because the sale does not take place in California and the use occurs in Nevada when the casinos make gifts of the merchandise. Merchandise shipped from Utah to the taxpayer and then shipped

by the taxpayer to the casinos in Nevada is not subject to tax because the sales are exempt sales in interstate commerce. If the taxpayer makes deliveries from its California stock to casino patrons in California, tax would apply based on the retail selling price of the merchandise. 8/5/94.

280.0205 **Catalogs.** A California taxpayer purchases catalogs from an out-of-state printer (vendor) and has the catalogs sent directly to its California facilities where they are stored for future shipment nationwide. The catalogs were brought into this state approximately 90 days after purchase and were subsequently shipped free of charge from California to potential customers nationwide.

The taxpayer made a gift of the catalogs in California when it withdrew the catalogs from its California warehouse and shipped them to prospective customers by common carrier or U.S. Mail. Thus, use tax applies. If the taxpayer had first shipped the catalogs to its out-of-state warehouse, and then shipped them to prospective customers, section 6009.1 would exclude the purchase from tax since petitioner's sole use in California would have been to store them for subsequent use solely outside the state.

Even though the catalogs may have entered this state 90 days after the date of purchase, the taxpayer first functionally used the catalogs in California when they were given to prospective customers. There was no functional use outside the state. The taxpayer made only two uses, storage and gifting, and both occurred in California.

Accordingly, the use of the catalogs by the taxpayer is subject to use tax measured by the sales price of the catalogs to the taxpayer. 1/4/94.

280.0220 **Cereal Manufacturers.** A cereal manufacturer advertises on its cereal boxes that premiums (e.g., jump ropes, space weights) may be purchased for an agreed price, plus proof of purchases (box tops) of the cereal. The cereal manufacturer contracts with the supplier of the premiums that the supplier will (1) purchase the premiums; (2) handle the orders; (3) mail the premiums; (4) collect the price; (5) pay the cereal manufacturer a commission on a per sale basis; (6) handle complaints; and (7) maintain premium quality standards. Orders are addressed by reference to the premium offer (e.g., jump rope offer, space weights offer, etc.) at a post office box. The advertising describes the premium offer as made by the cereal manufacturer. The advertising does not identify the supplier of the premiums.

Given such facts, the cereal manufacturer is holding itself out to customers as the retailer of the premiums (chiefly by product identification) and is liable for the sales tax, or has a duty to collect use tax if nexus with California is present. For the cereal manufacturer to avoid the sale tax or use tax collection duty, the advertising on the cereal box must clearly identify the premium supplier for whom the advertising is performed so that it is clear to customers that the cereal manufacturer is merely providing advertising for an identified premium retailer. 7/21/87.

280.0240 **Complimentary Beer Furnished by Breweries.** Breweries who provide beer free of charge to their employees pursuant to union contracts or

otherwise give away beer are subject to tax measured by their purchase price of the nonexempt ingredients. However, ingredients which are food products are exempt even though incorporated into a taxable beverage. Such ingredients as sugar, corn grits, soy bean flakes, etc., are food products meeting this test. Hops are to be considered a flavoring extract and therefore a food product. Chemical additives are not food products and are subject to tax. 9/26/69. (Am. M99–1).

280.0260 **Complimentary Drinks.** Sales to airlines of alcoholic beverages and mixes to be furnished as complimentary drinks to their passengers are subject to sales tax. 11/19/63.

280.0280 **Complimentary Drinks.** When a tavern owner gives to his customers free drinks of liquor purchased for resale, he is the consumer thereof and liable for the tax measured by the purchase price to him of the liquor. The measure of tax to be reported does not include any amount in addition to the actual purchase price of that quantity of liquor given away. 1/19/67.

280.0300 **Contest.** There is no tax due on the transfer of an automobile to a contest winner when sales tax has been paid on the prior transfer of the automobile to the promoter of the contest. The transfer to the contest winner is not a taxable sale because the automobile is acquired by chance or skill, and there is no use tax liability because the automobile is received as a gift or premium rather than a purchase. 8/1/67.

280.0320 **Contest.** A manufacturer conducts a contest as a result of which some of his merchandise is delivered to California winners by the manufacturer's distributor. The manufacturer reimburses the distributor of this merchandise. The manufacturer is the consumer of the merchandise prizes and the distributor has made a taxable retail sale thereof to the manufacturer, the measure of tax being the amount for which the distributor is reimbursed by the manufacturer. 2/10/55.

280.0340 **Contest.** Winner of a contest receives a diamond valued at $50. He was required to have the diamond set in a ring sold by the donor at a total price of $129.50 less allowance of $50 for the diamond, leaving a balance of $79.50. The donor has given away the diamond for advertising purposes and is the consumer thereof. Accordingly the measure of the tax is the $79.50 plus the cost to the donor of the diamond. If the donor had purchased the diamond under a resale certificate, he would be required to include its cost in his measure of tax. 5/11/54.

280.0345 **Contest Prize—Automobile.** An auto manufacturer requests that a local dealer deliver an auto to the winner of a contest. The car is to be delivered from the dealer's inventory. The winner has no need for the auto and would like the dealer to keep it and give him cash instead. In as much as the winner will not receive either title or possession of the auto, there is no liability for sales or use tax. 3/26/93.

280.0350 **Coupons and Gift Certificates.** An inquiry was received as to how sales tax applies in certain situations where coupons are tendered to a retailer at the time of purchase of tangible personal property.

GIFTS, MARKETING AIDS, ETC. (Contd.)

If a retailer distributes coupons to the public or some segment of the public without charge, tax does not apply to the discount allowed upon redemption of the retailer's own coupon. On the other hand, where the retailer redeems coupons issued by manufacturer or by another third party, the measure of tax includes the amount collected from the customer as well as the amount collected by the retailer from the manufacturer or other third party.

Tax does not apply to the sale of gift certificates. Upon redemption of the gift certificates, the value of the certificate is includable in the measure of tax. Gift certificate transactions are not treated as discount transactions but regarded as credit memorandums. 12/19/78.

280.0356 **Dealer Incentive Program.** Company A's client established a dealer incentive program whereby dealers are offered various premiums based on the amount of merchandise purchased by them for resale. Upon making a purchase, a dealer selects his premium from a catalog or brochure and submits a special order form along with the merchandise order to the client. The client notes its approval and forwards the special order to A. A sends an order to an out-of-state supplier of the premium who ships the premium directly to the dealer and bills A for the premium. A in turn obtains reimbursement from its client at A's cost plus 10 percent.

The client is the retailer of the premium delivered to its dealers. Tax applies with respect to the sale of premium items delivered to California dealers but not with respect to premium items delivered to out-of-state dealers. It is immaterial that the premium items delivered to California dealers may have been shipped directly to the dealers from an out-of-state supplier. Tax applies to the gross receipts from the sale of the premium, which will be regarded as the cost of the premium to the client (A's cost + 10%), in the absence of any evidence that the client is receiving a larger sum. 1/6/78.

280.0360 **Deposit of Gift in Mail** out-of-state passes title at that time, and donor is not liable for use tax. 7/18/50.

280.0373 **Discount of Catalog Price Against First Purchase.** A retailer sells catalogs to customers and agrees to deduct the amount paid for the catalogs against the customer's first purchase.

The transfer of a catalog for a consideration is a sale of tangible personal property. The charge for the catalog is included in the retailer's gross receipts at the time of the transfer of the catalogs. Later, when the customer purchases merchandise and is given a discount measured by the price he/she paid for the catalog, that discount will be considered to be an adjustment to the price of the merchandise and may be excluded from the sales price of the merchandise. If the two items are sold at the same time, the merchandise and the catalog, the net result is the same as stated above. 4/21/82.

280.0380 **Discount Coupons.** A promoter contracts with restaurants and amusement operators to distribute discount coupons redeemable for $5.60 in meals and/or admissions. The promoter purchases the coupons from a printer for

the fabricated cost thereof. The promoter sells coupons for $4.80 each to distributors who use them at the contracting restaurants or amusements as payment for $5.60 worth of meals or admissions. The restaurant or amusement operator returns each coupon to the promoter who pays the restaurant or operator $4.40. The promoter is the consumer of the printed tickets and subject to tax measured by the amount paid by him for the printed tickets. 8/31/66.

280.0390 **Donations.** A person who donates property is the consumer of that property for purposes of the application of sales and use tax. Consumption occurs when title passes from the donor to the donee. Thus, if a donor transfers property to a carrier in California or places it in the mail in California, the donor has made a use of the property in California and he/she is liable for use tax if he/she had purchased the property extax under resale certificate or outside California. The destination of the property, whether in California or outside California has no significance. If delivered in California there is no exception on account of a subsequent shipment of property outside California. Conversely, if the property was shipped by common carrier from outside California or placed in the mail outside California, the donor is regarded as having consumed the property outside California. No tax is due from donees receiving and using the property in California since the donees did not purchase the property. 1/8/92.

280.0480 **Enclosures.** Circulars containing both advertising material and directions for use of four products of a manufacturer, enclosed in a box containing only one of such products, is clearly advertising as to the other products and as such, is used by the manufacturer and subject to tax. 5/11/54.

280.0500 **Enclosures.** If the enclosure is primarily for advertising purposes the tax is applicable. If, however, the enclosure is in the nature of directions, instructions, or information desired or needed by the consumer of the goods, the mere fact that advertising is also contained in the enclosure will not cause the tax to apply. 5/29/51.

280.0520 **Enclosures.** Notice of Guarantee placed in garment sold, if not primarily advertising material, is regarded as resold with garment. 10/8/51.

280.0525 **Envelopes Used to Mail Film Sold for Processing.** A mail order company makes an initial sale of film for a pre-paid amount. Included with the film mailed to customers is an informational brochure and two envelopes which are used to return the exposed film for processing. The envelopes are pre-addressed to the mail order company. Attached to the envelopes are two tear-off items. One is a ‘‘return address label’’ upon which the customer fills in his name and address and encloses in the envelope with the exposed film for processing. The other attachment is a ‘‘print reorder form’’ to be filled in and returned in the envelope. One side of the envelope contains a statement limiting the mail order company’s liability regarding the film. The other side is completely covered with printing as a ‘‘mail order form’’ to be used by the customer to order processing for prints or slides and/or new rolls of film. The customer places the exposed film, payment, and order form in the envelopes provided and mails them to the mail

order company. The mail order company upon receipt, discards the envelope, processes the exposed film and fills the customers' order.

The mail order company is the consumer of the envelopes. This conclusion is based on the finding that the primary function of these envelopes is to solicit sales of other products. The pre-paid film customers did not bargain for the acquisition of the envelopes. Once the mail order company obtained the purchase price and the customer acquired the new film, that sale transaction was complete. At that time there was no agreement that the customer would return the exposed film to the mail order company for processing, including the sale of slides and/or prints. When, and if, subsequent actions occurred, these actions were pursuant to a different agreement among the parties for a separate consideration. The envelopes functioned as an advertisement, order-form and container for that subsequent transaction. The envelopes were not, therefore, a part of the original transaction involving the sale of the new film but were provided by the mail order company in anticipation of future sales. 10/31/85.

280.0540 **Free Goods.** A person distributing containers and matches without charge is the consumer thereof and the sales tax or use tax, as the case may be, applies with respect to the purchase of the merchandise. 5/19/54.

280.0560 **"Free" Goods in Exchange for Coupon.** The giving of a "free" bar of soap to a customer by a grocer in exchange for a coupon issued by the soap manufacturer is considered a sale, not a gift, and is, therefore, taxable, because the coupon is the consideration for the sale of the soap. The manufacturer reimburses the grocer for the value of the soap given to the customer in exchange for the coupon, which constitutes the consideration upon which the tax is computed and for which the retailer is entitled to reimbursement from his purchaser. 11/24/69.

280.0565 **Free Merchandise Based Upon Volume of Purchases.** A taxpayer's customers earn coupons based on their previous purchases. These purchases are entirely subject to sales tax. The coupons entitle the customers to receive a various number of units of free merchandise. Upon redemption of the coupons, if the number of units purchased exceeds the number of free units of merchandise allowed, the customer is charged for the remaining units with tax reimbursement computed on the balance. Under these conditions, the free units are regarded as being sold with the previous units, which entitled the customers to obtain the free units. Since sales tax is reported on all the consideration received for the sale of the previous units, no further tax is due. 1/24/89.

280.0570 **Fund Raising Organization—Supplies and Premiums.** A fund raising organization sells goods through student groups and operates in a manner which makes it the retailer of the goods sold through the student solicitors. In connection with these fund raising activities it provides the following category of goods:

(A) Catalogs, posters, and other such items which it ships from its California warehouse to its employees for distribution to school groups.

GIFTS, MARKETING AIDS, ETC. (Contd.)

(B) Samples of prizes and merchandise.

(C) Envelopes, mailing labels and flyers which are shipped from the organization's California warehouse directly to the school groups.

(D) Prizes which are awarded to students and sponsors.

All this property has been purchased ex-tax either under a resale certificate or from an out-of-state supplier.

The fund raising organization is responsible for the tax on these items as follows:

(1) It is the consumer of catalogs, posters and other such items. While the total amount the organization received for all of the merchandise includes the recouped cost of these items, there is no specific consideration for these items. The school groups pay only for merchandise sold. If no items are sold or the event is canceled, the school groups pay nothing.

(2) The fund raising organization is liable for sales tax on the items it improperly purchased in California under a resale certificate because it knowingly gave a resale certificate which it had been advised by the Board was improper (Section 6094.5). It is responsible for use tax on the items purchased out of state and shipped to in-state employees for delivery to in-state schools.

(3) Those items purchased out of state and sent to employees out of state to be delivered to school groups out of state are not subject to tax under the provisions of Section 6009.1 because the gift of the merchandise took place out of state.

(4) The fund raising organization is the consumer of the samples. While the samples were used for demonstration and display, they were not held for sale in the regular course of business. They were purchased in small lots for the limited purpose of being used as samples and upon obsolescence they were destroyed or given away. No attempt was made to sell them.

(5) The fund raising organization is liable for tax on the flyers, mailing labels and envelopes in the same manner as the catalogs, etc., except that the section 6009.1 exclusion is not available. Because the property was sent directly to the student groups, the gift took place in California when the property was deposited in the mail. Accordingly, there was a ''use'' in California and the property is subject to tax, not withstanding any subsequent out-of-state shipment.

(6) The fund raising organization is the retailer of the prizes since the award of such prizes was dependent upon the number of sales made by the participants or by other goals. Accordingly, valid consideration was received. Prizes shipped out of state are exempt as sales in interstate commerce and the in-state deliveries are subject to tax measured by the stated value of the prize. If there is no stated value, the fund raising organization's cost will be presumed to be the selling price. 4/26/90.

280.0580 **Gift Certificates.** A gift certificate purchased with cash by a customer from a retailer is evidence of an intangible right and therefore not subject to sales tax. The application by a donee of such a certificate to his charge account does not constitute ''merchandise returned'' because there is no sale of merchandise. 1/25/61.

GIFTS, MARKETING AIDS, ETC. (Contd.)

280.0581 **Gift Certificates.** A public television station as part of its fund raising activities conducts an annual auction. A merchant who wishes to contribute pledges a specified amount which the station incorporates into a gift certificate. The certificate is made redeemable in merchandise at the merchant's store. The station auctions the certificate to the highest bidder who, in turn, redeems the certificate at the merchant's store. The following example illustrates an application of the sales tax.

The station receives a gift certificate donation for $200 worth of jewelry. The gift certificate is purchased at the auction for $150. The certificate is exchanged for a ring retailing for $180. The buyer pays $150 to the station and $11.70 (6.5% of $180) to the donor.

It is concluded that the above example illustrates the proper application of sales tax. The following language which was proposed to be included on the gift certificate is also approved: ''Tax, if applicable, will be collected by the donor. The tax is based on the price of the merchandise received.'' 3/11/81.

280.0620 **Gifts Mailed Out-of-State.** Where a gift is purchased and the purchaser directs the vendor to ship it to an out-of-state donee, the sale occurs in interstate commerce. 12/6/61.

280.0640 **Gifts Purchased Under Resale Certificates.** A donor is liable for use tax when he makes a gift in-state of merchandise purchased under a resale certificate, or outside the state. There is no exception on account of a subsequent shipment of the property outside the state. 3/15/60.

280.0660 **Gifts to Charity.** When merchandise purchased for resale has become unsalable and, thus, must be discarded, it may be given to charity or otherwise disposed of without incurring tax liability. 11/28/66.

280.0670 **Gift Versus Loan of Property.** A computer manufacturing company transfers personal computers to selected educational institutions in this state. The recipient institution is free to use the property as it sees fit. However, the institution is under an obligation to return the property to the manufacturer or destroy the property if and when the property becomes obsolete. The computers are shipped by the manufacturer from a point outside this state, and title to the computers pass to the educational institution outside this state pursuant to agreement terms.

The above transaction is a gift subject to a condition and not a mere loan. The critical fact is that, although the transferee may not alienate the property, the transferee has no absolute duty to return it, but may alternately destroy the property upon obsolescence. If there was an absolute duty to return the property, we would treat the transaction as a loan, despite the title provision, because an absolute obligation to return the property would be incompatible with a transfer of title. 5/14/84.

280.0680 **"Grand Opening" Gifts.** Where gifts and prizes are awarded by a market at its ''grand opening,'' some of which were furnished at no charge to the market by suppliers, and other merchandise was purchased specifically for this

use or used from regular stock normally held for sale, none of which were exempt food items, the use tax applies. Measure of tax is cost of merchandise to market. Supplier would be subject to use tax on items donated to market. 4/26/57.

280.0686 **Gravitation II.** "Gravitation II" is an automated game paying out tickets every time a player deposits 25 cents into the machine. It also dispenses additional tickets when the player wins. A value of 12 ½ cents is assigned each ticket. A customer, upon presentation of the tickets to the operator, is given credit towards the purchase price of the operator's merchandise.

Since the customer always receives tickets redeemable for merchandise when he deposits his money, the operator should not be treated as the consumer of any of the merchandise delivered to the customer, notwithstanding the fact that some portion of the tickets redeemed may have been obtained by the customer through skill or chance. Sales tax would be based on the gross receipt from this machine pursuant to Regulation 1670(d).

If the customer exchanges his tickets for merchandise from a third party pursuant to an agreement between the machine operator and the third party, the tickets would then be purchased back by the operator from the third party for a stated amount. In this situation, the third party is the retailer responsible for reporting tax based on the amount received by the third party pursuant to Regulation 1671(f). 8/19/82.

280.0700 **Gross Receipts, Redemption Value as.** The redemption value of a coupon distributed by a manufacturer to a consumer, which is redeemed by a local retailer for the manufacturer's product, constitutes taxable gross receipts from the sale of the product, where the retaler will be reimbursed the price of the product by the manufacturer. 9/12/67.

280.0708 **Healthwise Handbook.** A California HMO had handbooks printed out of state and the printer shipped the handbooks by common carrier to postal centers in California. The postal service delivered the handbooks directly to the members in California. There was no charge to the member for the handbook. The handbooks are preaddressed and postage paid when they come to the California postal facility.

In this case, the gift of the handbooks takes place outside the state when the printer delivers them to the common carrier for shipment directly to the recipient in view of the fact that their journey is not interrupted for any purpose unrelated to their delivery to the HMO's members. Thus, there is no use of the handbooks made by the HMO in California to which tax applies. 8/18/95.

280.0715 **Ice Cubes Used in Complimentary Drinks.** Ice cubes sold to airlines for the purpose of placing them in complimentary drinks for passengers are not being resold by the airlines, but rather consumed by the airlines. Thus, ice cube sales to airlines for such purposes are subject to sales and use tax. 10/4/94.

280.0720 **Incentive Awards.** Premium houses are retailers of premium merchandise which they transfer to recipients in exchange for stamps, coupons or points, which constitute valuable consideration.

GIFTS, MARKETING AIDS, ETC. (Contd.)

Where an employer gives its salesmen "points" or other indicia as incentives, and a premium house redeems the points for merchandise which it transfers to the salesmen, the premium house and not the employer is the retailer. If the merchandise is transferred by the employer directly to the salesmen as an incentive award, the employer is the retailer. In either case, the retail sale is made to the salesman. The salesman and not the employer is subject to any use tax that may apply. 9/11/67.

280.0740 **Incentive Program.** Grocers throughout the nation are given points for selling manufacturer's products. They are also supplied with a premium catalog listing items which may be acquired by a grocer upon the surrender of points earned at the rate of 1H per point.

The manufacturer is selling the premium merchandise to the grocers whether it ships the merchandise or directs a supplier so to do. The selling prices is the number of points surrendered by the grocer at the rate of 1H per point.

Delivery of such premium merchandise to an out-of-state grocer is an exempt interstate commerce transaction. However, deliveries to California grocers are subject to sales tax. 8/31/55.

280.0760 **Incentive Program.** Salesmen and distributors of a corporation are awarded points based on the results they achieve, and they may redeem those points for merchandise. That is, the corporation is transferring merchandise to salesmen or distributors in exchange for services rendered. Accordingly, the transfers are for consideration and constitute sales. Since there is no agreed monetary valuation between the corporation and the salesmen and distributors, it appears that the best method for determining the taxable selling price of the merchandise is to use the amount paid by the corporation for that merchandise. 3/21/57. (Am. 2001–3).

280.0765 **Interstate Commerce—Marketing Aids.** A hardware wholesaler provides marketing aids to its customers under conditions making it the consumer of the marketing aids. The marketing aids are purchased from a manufacturer in Mexico who has an office and a warehouse in California. The warehouse is used for temporary storage prior to delivery to the manufacturer's customers by common carrier.

If the manufacturer fills orders from the wholesaler for shipments to the wholesaler's customers outside California, using goods from the manufacturer's California warehouse, the sale is not subject to either sales tax or use tax. Although the sale is to a consumer (wholesaler) and the sale occurs in California, the requirement that the merchandise be shipped out of state via common carrier, and it is so shipped, exempts the sale from sales tax under Revenue and Taxation Code section 6396. The fact that the property was not purchased for use in California and was not used in California prevents the use tax from applying. 2/16/90.

GIFTS, MARKETING AIDS, ETC. (Contd.)

280.0766 **Items Donated for Auction Sale.** Only one tax is imposed when an automobile purchased by a dealer under a resale certificate is sold at auction through an educational television station which keeps the proceeds and (1) the television station has accepted the automobile for sale subject to return if it is not sold, (2) there is no transfer of registration to the station, and (3) the dealer handles the registration on behalf of the purchaser and reports and pays tax on the sale.

The basis for this conclusion is that the dealer is merely donating the receipts from the sale of the vehicle. If a nonretailer donates the item, tax would apply to the sale of the item at auction. Even though the station may be acting as a trustee or agent, the station is an auctioneer and, therefore, is a retailer assuming it auctions a number of items. 5/15/68.

280.0767 **Lipstick in Exchange for Empty Containers.** A firm enters into a promotional program whereby a customer receives a free lipstick if she returns six empty make-up containers. The containers have no value and are discarded. The firm believes that the lipstick is not taxable as a premium sold along with the other items. The furnishing of the lipstick is a gift of tangible personal property. In this case, it is not a premium furnished upon the purchase of six items. The purchaser has no contract right to the lipstick and the promotion can be terminated at will. Thus, even if the customer had purchased six make-up items, she would not receive lipstick if the promotion had ended. The firm is the consumer of the lipstick furnished and tax applies to its cost. 10/25/96.

280.0768 **Manufacturer's Awards Program** A manufacturer/retailer of pool cleaning equipment sells mainly to distributors. However, it also sells parts to, and provides warranty service for, various preferred dealers. Under a promotional program, pool builders, retailers and service companies who purchased 12 units from one of the distributors would receive a bonus unit directly from the manufacturer. The units are all inventory items that, by terms of the award program, must have been purchased for resale to a pool owner. The bonus unit must also be of the same type as at least 50% of the total units purchased from the distributor. The manufacturer believes that the transfers of these bonus units qualify as quantity sales discounts and should not be subject to tax until the units are eventually resold to consumers by the pool builders, retailers, or service companies.

The bonus units are inventory items which are of the type sold by retailers in the normal course of business and are transferred to the retailers only because the retailers have already purchased numerous units manufactured by the manufacturer. The manufacturer's restrictions are evidence that the bonus units, like the dozen units already purchased, will be resold by the retailer in the regular course of business. We conclude that the sale of the bonus unit is a sale for resale and that no tax is due on the transfer. 5/23/90.

280.0769 **Marketing Aids—Purchased for Resale.** If the seller purchases a type of fungible marketing aids, some of which will be sold for 50 percent or more of the purchase price and some for less than 50 percent of the purchase

GIFTS, MARKETING AIDS, ETC. (Contd.)

price, the seller may purchase the aids for resale. Aids which are consumed (sold for less than 50 percent of the purchase price) would be subject to use tax at the time of their initial consumption.

If the seller purchases one type of marketing aid which the seller will provide for more than 50 percent of the cost, those aids may be purchased for resale. But if the seller also purchases a different type of marketing aids which will be provided for less than 50 percent of cost, those aids will be consumed and may not be purchased for resale.

GIFTS, MARKETING AIDS, ETC. (Contd.)

If the seller does not know at the time of purchase which will be sold (for 50 percent or more), the aids may be purchased for resale.

If purchased for resale, use tax must be paid for all aids provided for less than 50 percent of cost, even if sent to out-of-state consumers. Marketing aids provided to out-of-state consumers for less than 50 percent are taxable (subject to use tax on cost) because there is an initial use and, therefore, the moment of taxation is in California at the time the seller delivers the aids to the carrier and transfers title. Marketing aids for which the seller is the consumer which are sent to its out-of-state distribution center and shipped to buyers from the out-of-state location are not subject to tax because the seller does not transfer title to another person in California. 6/4/87.

280.0770 **Museums Open to Students.** A museum's practice of admitting secondary school students free of charge one morning a week as part of a planned school program will be considered to qualify under Section 6365(d)(3) as ''a museum which is open to a segment of the student or adult population without charge.'' The ''segment'' in this case would be all secondary school age children in the Pasadena School District. The museum allowing free admission to children under 12 when they are accompanied by an adult would not, by itself, qualify as being open to a segment of the student population without charge. The free admission for children under 12 being conditioned on a paid admission results in it not being truly a free admission as Section 6365(d)(3) requires. 4/4/79.

280.0777 **Phone Cards.** A firm proposes to seek out and find membership organizations that would promote prepaid phone cards in various ways. For example, in return for paying a certain level of dues, such as $100, the member would receive a $20 prepaid telephone card. The prepaid telephone card can be printed with the logo or special message of the sponsoring organization.

Sales of debit cards are not considered to be sales of tangible personal property within the meaning of the Sales and Use Tax Law. Instead, the debit cards are indicia of their prepaid value. Thus, the sale or use of a phone debit card as an indicia of its prepaid value is not subject to sales or use tax. Generally, the person who first sells the card as indicia of its prepaid value would be the consumer of the card, and sales or use tax would apply to the sale of the card to that person. 8/17/95.

280.0780 **Premium with Sale.** Where a retailer offers certain personal property as a premium to former customers who reopen or add to their existing account by the purchase of other merchandise within a limited time, the retailer is reselling the premium merchandise. 5/19/54.

280.0784 **Premium Sold by Oil Company To Dealer.** Sales of premiums to independent dealers are sales for resale, pursuant to Regulation 1670(c), when the premiums are to be given to the dealer's customers only if the customers purchase other specified goods or services. These sales are sales for resale notwithstanding that the oil company's selling price to the dealer is less than 50% of cost.

GIFTS, MARKETING AIDS, ETC. (Contd.)

When the service station dealer delivers a premium, together with a purchase of nontaxable labor, the selling price of the premium will be deemed to the cost of the premium to the oil company or the cost to the independent dealer, whichever is the greater.

If the premium delivered is a nontaxable item (e.g., food product) and the goods required to be purchased are of a taxable nature (e.g., gasoline), the same rule would apply. The sales price of the nontaxable item would be deemed to be the cost of the premium to the oil company or the cost to the independent dealer, whichever is the greater. The premium sales price is deducted from the sales price of the taxable item. If the dealer obtains tax reimbursement on a larger amount, the dealer will be required to pay the excess tax reimbursement to the state.

In situations where the premium is delivered in connection with a transaction involving both taxable and nontaxable charges (e.g., a lube job and an oil change), total consideration received must be allocated among three items (i.e., the premium, the oil change, and the lube job). 9/8/72; 7/10/96.

280.0790 **Premiums.** As part of a retail marketing program, a manufacturer places on the cartons containing its product offers for the sale of property manufactured by another manufacturer. The second manufacturer processes all orders and makes all shipments. The offer makes it clear that the second manufacturer is the seller of the advertised product. Thus, the second manufacturer rather than the first manufacturer is the retailer. 3/30/79.

280.0791 **Premiums.** A cigarette manufacturer included coupons redeemable for merchandise in the cigarette packages. The premiums were available only from the manufacturer.

In this situation, the premiums are regarded as being sold with the cigarettes. There is no additional tax due on the purchase of premiums by the manufacturer or the redemption of the premiums by the consumer. 1/16/73; 5/29/96.

280.0797 **Promotional Games.** Company A creates promotional games for sales programs of manufacturers. The game pieces are attached to manufacturer's products. Since the game was a game of chance, it is not a premium as contemplated by Regulation 1670(d). The game had no relation to the article sold, but merely was a promotional device. The sale of game pieces to the manufacturer is a retail sale, not a sale for resale.

Charges for creating, monitoring, and administering the game are nontaxable services. 10/25/83.

280.0800 **Promotional and Goodwill Gifts.** Golf clubs and equipment purchased ex-tax for resale and given to professional golfers who demonstrated and sold the equipment were subject to use tax because the equipment and the clubs were gifts for promotional and goodwill purposes. 4/16/70.

280.0820 **Promotional and Goodwill Gifts.** Sales of promotional material to retailers who distribute the material free to their customers for buying certain of their products are taxable retail sales. 9/27/65.

GIFTS, MARKETING AIDS, ETC. (Contd.)

280.0828 **Pro Tournament Meal and Gift Certificates.** A golf club holds golf tournaments in which the majority of the required entry fees are used for prizes in the form of discounts or gift certificates for use at the golf pro shop operated by the golf club. In some tournaments, the entry fee also entitles the entrant to a free dinner at the club restaurant.

The meals provided are subject to tax based on the regular menu price. The inclusion of the meal in the entry fee would not exclude the retail selling price of the meal from tax. The portion of the entry fee not assigned to the meal is a payment for the intangible right to compete in the golf tournament and is not subject to tax.

Tax also applies to the retail selling price of the goods sold to prize winners by the pro shop. The discounts or gift certificates are considered the same as cash prizes. When goods are purchased at the pro shop, the retail selling price is subject to tax because the discount or gift certificate is considered to be merely a form of payment, and it would not be considered that the retail selling price has been reduced. 5/26/76.

280.0833 **Provider of Prizes to Game Shows.** A provider of prizes for game shows bills the game show for an auto but neither possession nor title to the auto is transferred to the game show. Therefore, if the winning contestant opted to accept monies instead of the auto, there is no sale of the auto to the game show since neither possession nor title to the auto, which is necessary for a sale to occur, was transferred to the game show. If title or possession was transferred, and the winning contestant opted for monies instead, upon the auto's return, a returned merchandise deduction is allowed if all the conditions of Regulation 1655 are met. 8/18/86.

280.0840 **Radio Contestant.** Gifts of merchandise to the contestant on a radio or television program are consumed by the sponsor of the program even though the merchandise is shipped directly to the contestant's home from another firm hired by the sponsor. 12/4/53.

280.0860 **Recipe Booklets.** Booklets containing reprints of recipes of food in which specific cooking wines can be used are not exempt labels but are gifts or premiums which are taxable under Regulation 1670 because the booklets are not designed to give instructions on the proper use of a product or warnings to customers as to dangers involved in the use of certain items. 10/24/69.

280.0870 **Sales By Publicly Supported Television Stations.** The measure of tax on the sale of tangible personal property by a publicly supported television station is the sales price of the property to the television station when the following conditions are met:

(1) A viewer makes a contribution to a nonprofit, publicly supported television station and receives tangible personal property upon making the contribution.

(2) The primary purpose of the contribution is to make a donation to support the television station.

(3) There is a significant disparity between the amount of the contribution and the retail value of the property received in connection with the contribution.

If the television station has paid sales tax reimbursement or use tax on its purchase of the property, no further tax is due. 4/23/93.

280.0875 **Sales for Less Than 50% of Cost.** A firm sells its product for approximately 25 percent of its cost. The customers are not required to subscribe to any service.

The firm is the consumer of the product and the measure of tax is the cost of the product to the firm. 4/2/93.

280.0880 **Sales Promotion Devices** purchased by a distributor from the manufacturer and sold to the distributor's retailers at cost, or less than cost, are sales for resale by the manufacturer and are taxable retail sales by the distributors, the measure of tax being the actual charge made to the retailer. 5/19/54.

280.0885 **Sales Promotion Program.** A taxpayer who operates a chain of supermarkets entered into an agreement to purchase a certain sales promotion program. The agreement provided that the supplier would furnish, free of cost, display banners, newspaper mats and special punches, but the punches remained the property of the seller and were to be returned upon termination of the program. The agreement provided that all program material would be shipped prepaid and all title to such articles, except for the special punches, would pass from the seller to taxpayer upon delivery to the common carrier. The cost of the program was measured by the number of punch cards which were ordered, i.e., 10 cents per card. It was agreed that all reorders would be on the same terms and conditions stipulated in the initial agreement.

The taxpayer paid $1,000 for a block of 10,000 punch cards which were programmed to award $15,000 in cash prizes on sale of merchandise totaling $1,000,000. Each punch card contained a seal under which designated amounts usually ranging between $1.00 and $100.00. The taxpayer gave the punch cards to its customers. Each time a customer purchased merchandise, his card was punched in the amount of the purchase. When the customer had purchased $100 in merchandise, her card was completely punched. At that time, the taxpayer's employee would break open the sealed portion of the card and give the customer the amount printed under the seal in cash. It also was possible for a customer to participate without making any purchases, since cardholders could have one free punch per week and could thereby complete a card in thirteen weeks and could receive the amount indicated under the seal.

The seller's representative initially gave advice with respect to such issues as to how to distribute the cards, where to keep the cards, etc., to insure that the program started correctly. The seller also furnished instruction sheets. After the program was started all that was needed to continue the program was the necessary supply of correctly programmed punch cards.

Based on the facts, it is concluded that the purchase price of the program was primarily attributable to the punch cards and only incidentally attributable to the advice and assistance given by the seller to help insure that the advertising

program was successfully initiated. Accordingly, taxpayer is not purchasing a service in the form of an advertising program. Instead, the taxpayer is purchasing tangible personal property in the form of copyrighted punch cards. Thus, tax applies to purchase price of the punch cards to the taxpayer.

Additionally, in this type of program, the customer receives cash rather than premium merchandise from the retailer or a third party. The receipt of such an amount would appear to be in the nature of a gift rather than a discount, in view of the uncertainty as to the amount, and the fact that such amount has no direct relationship to the amount of the individual customer's purchases. Furthermore, the card may be punched by the store and redeemed by a person without him ever having made a purchase. Under the circumstances, there is no basis at all for considering such amounts (cash prizes) as a discount. 4/29/65.

280.0888 **Sample Kits.** A retailer furnishes sample kits, containing merchandise with a stated retail value, to marketing personnel who use a ''hostess party'' system to market the merchandise. The marketing personnel are allowed to retain the kits if they meet certain sales levels. Under the above conditions, the retailer is a seller, not a consumer, of merchandise provided to marketing personnel as compensation for their marketing efforts. The transactions are sales because there is a transfer of title and possession of the merchandise for a consideration, namely the marketing work done by the marketing personnel. 9/16/93.

280.0900 **Samples.** Samples furnished to doctors by the manufacturer are self-consumed by the manufacturer and the tax applies to sale price of the ingredients and container to the manufacturer. 12/2/63.

280.0920 **Samples.** Property purchased for resale given as sample, becomes property purchased for purpose other than resale. Tax applies to original sale even though original seller reimburses taxpayer for the cost of the property given away as sample. 5/18/51.

280.0930 **Samples.** A taxpayer purchased sample jewelry in Asia and had fabrication work performed on the samples in Florida. The jewelry was then brought into California. The jewelry was shipped to dealers both inside and outside California as samples for display purposes. The packages in which the jewelry was shipped contained a packing slip noting a price for the samples. Some dealers remitted the price shown. Other retailers did not. The taxpayer regarded the furnishing of the samples as consignments and made no attempt to repossess them.

With respect to payments received from the dealers, the taxpayer is the retailer of the display samples. Tax applies to the sales to California dealers. The storage in California prior to shipment is not taxable.

With respect to transfer of samples to California dealers without payment, the taxpayer is regarded as having made a taxable use of them in California. Use tax applies to the taxpayer's cost.

Inasmuch as the samples shipped out of the state remained the property of the taxpayer, no tax applies because the use in California was excluded from the definition of ''use'' under section 6009.1 and all other use occurred outside California. 3/14/94.

GIFTS, MARKETING AIDS, ETC. (Contd.)

280.0940 **Samples.** A manufacturer of automotive chemicals who ships free samples by common carrier from a point in California to donee is subject to the use tax. A measure of the use tax is the sales price to the manufacturer of the materials which make up the products that are distributed as gifts. 4/15/65.

280.0950 **Samples.** The use of fabric purchased from out-of-state vendors to make sample garments only for demonstration and display to prospective purchasers before being sold to employees is not subject to use tax. Demonstration and/or display in the regular course of business is not included in the definition of use. The sales to employees are sales in the regular course of the taxpayer's business.

The situation differs from Annotation 280.1020 because, in that case, the garments were purchased specifically as a manufacturing aid in producing its own products and not for ultimate sale in the regular course of business after demonstration and display to prospective customers. 3/21/94.

280.0960 **Samples.** A wholesale distributor purchases along with his regular items, samples of these same products. Some of the samples are used in California, but many are sent to out-of-state offices for the purpose of being given away or used in demonstrating the products.

The wholesaler is the consumer of the samples and the sale to him is a taxable retail sale. If the sale of samples is made in California, the fact that the purchaser will use the property out-of-state does not exempt the transaction unless the seller is required to ship the goods to such out-of-state points.

If sample goods are obtained by merely withdrawing a sufficient quantity from regular inventory, such goods may be purchased ex-tax. Upon such withdrawal of samples and use thereof in California the use tax, measured by the cost of such samples will apply.

If sample goods are specifically purchased for such purpose, the giving of a resale certificate is not proper as the sales tax applies to such purchase. 12/22/53.

280.0970 **Samples.** A taxpayer purchases items used by its salespersons as product samples. The supplier pays a rebate to the taxpayer based on the taxpayer's annual volume of purchases for resale. The rebate is limited to a maximum which equals the cost of the samples purchased. The rebate is not regarded as a reduction in the price paid for the samples, thus tax is due on the samples based on the full amount originally paid for them. 1/12/76.

280.0980 **Samples.** A paint manufacturer was the consumer of color cards and color chips which it provided to retailers without charge to facilitate the sale of the manufacturer's paid products. The sales aids did not qualify as exempt labels because they were not intended to be affixed to property for sale. They did not constitute premium merchandise because they were not intended to be given as a premium for the purchase of other property. 7/6/67.

280.1000 **Samples.** Use tax applies to dental adhesive powder purchased ex-tax for resale, packaged as samples and distributed through the mails to persons outside the state. 12/16/65; 12/20/65. (Am. M99–1).

GIFTS, MARKETING AIDS, ETC. (Contd.)

280.1020 **Samples.** A manufacturer of women's apparel which purchases garments of other manufacturers to use as style samples is liable for use tax on the cost of the samples, as well as for sales tax on gross receipts derived from their subsequent sale. The manufacturer's use of the garments in designing its own products is a use other than retention, demonstration or display while holding the garments for resale. 10/14/64.

280.1040 **Samples.** An out-of-state manufacturer is not liable for California use tax with respect to sample merchandise mailed or shipped by the manufacturer from a point outside this state directly to prospective purchasers in California. 11/25/55.

280.1060 **Samples.** Samples distributed in this state by salesmen of out-of-state retailer, use tax applies to such use by retailer even though at time of purchase retailer did not know where sample would be ultimately used. 1/28/52.

280.1080 **Samples.** Style samples are subject to use tax if purchased ex-tax for resale and then used to perfect or copy garment styles. However, ''piece good yardage'' purchased and used for manufacturing coats is not subject to use tax although less than 25 yards were purchased and the yardage was draped over models to aid the manufacturer in making or designing the garment to be manufactured. 11/19/65.

280.1085 **Samples—Carpet.** An out-of-state carpet manufacturer makes a taxable use of carpet samples in California when the manufacturer addresses the samples to retailers but ships the samples to the manufacturer's California employees who then forward the samples at no charge to the retailers.

Until the employees in California forward the samples to the retailers, the manufacturer has not relinquished ownership of the samples. Therefore, the taxable use, i.e., the giving of the samples to the retailers, occurs in California. 8/17/87.

280.1090 **Samples and Donations of Wine.** A taxpayer purchases bottles, corks, labels, and foil under a resale certificate. The property is fabricated into containers for wine. Some bottles of wine are given away as samples or donated to organizations by shipping them out of state.

Since the containers are given away and not sold, California has nexus to tax the taxpayer's use of these containers as self-consumed tangible personal property. The taxpayer makes a gift of the containers and their contents within this state. To perfect a gift, there had to have been delivery. Delivery occurred in this state when the company deposited the containers into the possession of an independent shipper for transportation to the donee. Such delivery is constructive delivery and acceptance of the gift is implied. *Burkett* v. *Doty* (1917) 32 Cal.App. 337. Use tax is due on the purchase price of the components of containers used to ship the samples and donations. 7/31/90.

280.1096 **Samples vs. Marketing Aids—Carpets.** The term samples should be used only in reference to area rugs or carpets which are held for demonstration and display and are subsequently sold to customers. On the other hand, carpet

GIFTS, MARKETING AIDS, ETC. (Contd.)

remnants that are bound together to form swatch books are regarded to be marketing aids, and the rules explained in Regulation 1670 apply. Thus, a person such as a manufacturer or wholesaler is the consumer of a swatch book which the person transfers for less than 50 percent of that person's purchase price. For the manufacturer, the purchase price is generally the purchase price of the materials it incorporates into the marketing aid. A person is the seller of the marketing aids which it transfers for 50 percent or more of that person's purchase price and sales or use tax applies to the sales price charged the customer for the swatch book. 9/26/95.

280.1097 **Samples Sold to Salesmen.** A manufacturer sells merchandise samples to its salespersons at 50% off the regular price. When the sample is no longer useful, the salesperson is at liberty to dispose of it as he wishes. He may keep it, give it away, or sell it for any price he can negotiate and keep the proceeds.

The sales to the salesperson are taxable sales even though the only use of the samples may be demonstration and display, because this use does not occur while the samples are being held for resale in the regular course of business. Any subsequent sale of the sample by the salesperson is optional and purely incidental, and in the same category as the disposal of any fixture, machine, auto, etc., after its useful life is finished. If the salesperson later sells it to a retail store, he would not incur tax liability if the store purchases it for resale. The salesperson would incur liability on retail sales if he made three or more sales in any 12-month period. 11/18/58.

280.1100 **Service Stations.** Transfer of premium merchandise to customers by service stations are sales whether paid for entirely with points, entirely with cash or partly with points and partly with cash. The taxable selling price is the posted money value of the merchandise. 1/18/56.

280.1140 **Stock in Trade, Gift of.** Merchandise purchased for resale and used instead for the purpose of making a gift is not exempt from use tax. A gift made of inventory stock purchased ex-tax for resale is subject to the use tax since a use was made of the merchandise in California other than retention, demonstration, or display while holding such property for sale in the donor's regular course of business. Although the donor in this state ships the gift to the donee out of state, the making of the gift constitutes a taxable use in this state and the imposition of the use tax does not constitute an unconstitutional burden on interstate commerce. 3/21/67.

280.1144 **Promotional Program-Sweepstakes.** Company A is a California retailer with retail outlets in California and other states. Its warehouse is located in California. Company A enters into a contract with Company B to provide $300,000 of merchandise for a sweepstakes promotion. Among other things, one of the purposes of the contract is to allow Company C, through its agent Company B, to obtain access to promotional opportunities afforded by Company A's mailing list and retail stores.

GIFTS, MARKETING AIDS, ETC. (Contd.)

The prize fund for the sweepstakes is $300,000 in cost of A's merchandise. B pays A the cost of property shipped each month plus 1.2% carrying cost on the value of the unshipped balance of the unawarded merchandise. Under these circumstances, A is the retailer of the merchandise. Tax applies to its cost price of the merchandise plus the 1.2% carrying cost.

As part of the contract, B pays A a portion of the cost of certain catalog costs. This reimbursement does not reduce the measure of tax on the purchase of the catalogs by A nor does it represent additional gross receipts from the sale of merchandise. It represents reimbursement for space in the catalog.

As part of the contract, Company C will issue merchandise certificates redeemable by A. These certificates are in lieu of discounts which A normally would provide to its customers. B, in turn, will pay A 85% of the face value of the merchandise certificates. The amount received by A are gross receipts from a sale. B is acting as C's agent in making payment to A. Deliveries of merchandise in California are subject to tax.

Another part of the contract provides that A will pay B a percentage of total sales made from a specific catalog. This payment is in consideration for C's advertising in the catalog. The payment is in the form of A's merchandise certificates. The distribution of the certificates is at B's discretion.

Under these circumstances, A is the consumer of any merchandise which it ships in redeeming the merchandise certificates. Tax applies to all withdrawals of merchandise from the California warehouse in redeeming these certificates even though some merchandise is shipped outside the state. The withdrawal from inventory for this purpose constitutes a ''use'' in this state. 8/20/89.

280.1150 **Transfer of Auto to Contest Winner.** A California employee has an automobile which her employer leased from another firm. As the result of winning a contest, she is to receive the car. The California employee is not subject to the use tax. However, the contest sponsor (apparently the employer) will owe use tax if it has not paid tax on its acquisition of the auto. 2/24/69.

280.1155 **Transfer With No Obligation To Pay.** A transfer of property which involves no suggested minimum donation and no obligation to pay the transferor even an uncertain amount is regarded as a gift, even if the transferee thereafter gave money to the transferor. Tax would not apply to this transfer and the transferor would be regarded as the consumer of the property which was provided as a gift. 1/12/90.

280.1158 **Unexposed Film Received In Connection With Film Processing.** A photo finisher distributes unexposed rolls of photographic film to customers who contract to have the photo finisher develop exposed film and to produce prints therefrom. The unexposed roll of film is given to the customer at the time he places the order for developing and prints. A separate charge is made for the prints and for the developing. The developing charge is claimed to be nontaxable pursuant to Regulation 1528(b)(3)(a). No specific charge is made for the unexposed film. In some instances the customer fails to pick up the order and pay the agreed charges. No attempt is made to collect these charges.

GIFTS, MARKETING AIDS, ETC. (Contd.)

Under the above situation, the unexposed film, the finished prints, and the developing service all represent consideration received by the customer in exchange for the payment of the agreed contract price. While the customer receives the unexposed film prior to the time he receives delivery of the prints and developing service, it is nevertheless clear that the customer receives the unexposed film only if he agrees to pay the price specified for the prints and the developing and not as a gratuity. Accordingly, the unexposed film must be regarded as sold rather than self consumed. This conclusion is not altered by the failure of the photo finisher to enforce collection with respect to persons who fail to pick up their finished prints and negatives. The failure to collect the contract price on these transactions is based on business expediency rather than the absence of a remedy.

The delivery of the unexposed film is considered to be a premium under Regulation 1670(c). This section also provides for an allocation of gross receipts to the retail sale of a premium sold with a food product or other item not subject to sales tax. Since the customer is required to pay the entire contract price in order to obtain the premium, it is consistent with Regulation 1670(c) to allocate a portion of the total contract price to the unexposed roll of film sold and delivered as part of the contract. 4/17/70.

280.1160 **Use of Prize.** ''X'' Co. distributes chances on a free automobile to customers as a means of furthering its sales of ''Y'' Co. products. The automobiles are purchased tax-paid by ''X'' Co. Following the award, ''Y'' Co. reimburses ''X'' Co. for the cost of the automobile. ''X'' Co. makes a taxable use of the automobiles in furthering its sales. The transfer of the automobile to the holder of the winning ticket in return for reimbursement paid by ''Y'' Co. is a taxable sale. For sales tax purposes it is of no consequence that a seller receives consideration from a person other than the person to whom he transfers the tangible personal property. 8/13/57.

280.1165 **Use of Property Purchased For Resale-Promotional Gifts.** Property purchased ex-tax for resale and subsequently shipped free of charge as a promotional gift to an out-of-state customer is subject to California use tax. The taxable ''use'' occurs in California when the property is transferred to a common carrier, prior to its shipment to the out-of-state customer. At the time of shipment, the donor has made all the use of that property that it ever will and has given up all power incident to ownership.

On the other hand, property shipped from ex-tax inventory in California to one of the donor's out-of-state business locations for use as a gift at that location is not subject to use tax. The tax does not apply because the use to which the tax would otherwise attach occurs outside of California. 10/6/93.

280.1170 **Vending Machines.** A vending machine is filled with small toys which requires the skill of the player in operating a claw before a toy is dispensed. If an appreciable skill is required, and the primary purpose of the machine is to provide entertainment by challenging a player to display the skill of operating the jaw, no

tax would apply to the charge for that entertainment. The vending machine operator would be the consumer of the product dispensed.

In general, if a vending machine dispenses tangible personal property to nearly everyone, then the primary purpose of the machine is to sell tangible personal property and the tax application on the sales from this vending machine is governed by Regulation 1574. If there is no assurance that a player will ever receive any tangible personal property, i.e., that receiving any tangible personal property is dependent upon the player's skills or knowledge, then receipts from these types of vending machines are not subject to tax. 6/18/93.

280.1175 **Wedges/Ledges.** "Wedges/Ledges" is an automated game of skill and chance since tokens are dispensed to a customer only when the customer wins. The tokens can be exchanged at the arcade for merchandise. Under the above circumstances, the machine operator is considered the consumer of the merchandise for which the tokens are exchanged and the tax applies with respect to the sale to or the use of the merchandise by the operator pursuant to Regulation 1670(d). 8/19/82.

280.1180 **Wholesalers Furnishing Premium to Retailers, General Rules Stated.** Where tangible personal property is furnished as a premium together with other tangible personal property sold, the transaction is regarded as a sale of both articles. Thus, where the principal merchandise is sold for resale and hence the sale thereof is not taxable, but included in the "deal" are premiums which are not sold for resale, it is necessary for the seller of the "deal" to ascertain that portion of the total charges made properly allocable to the premiums and return the tax measured by such amount. 3/24/50.

GOLD BULLION
See Coins and Bullion.

290.0000 GOODS DAMAGED IN TRANSIT—REGULATION 1629
See also Returns, Defects and Replacements.

290.0020 **Automobiles.** The sales tax applies to a purchase by a carrier of a shipment from outside this state of automobiles which the owner-dealer refused to accept because of damage in transit. The fact that the carrier planned to transport the automobiles out of the state for use in his business outside the state does not affect the taxability of the sale. 10/22/58.

290.0025 **Equipment Badly Damaged in Transit.** A California firm agreed to purchase certain equipment from a California vendor. The vendor ordered the equipment from an out-of-state firm. The invoice from the vendor to the purchaser stated "FOB Vermont." The equipment was badly damaged in shipment and, upon inspection at the carrier's terminal, delivery was refused. The purchaser filed a claim with the carrier, which paid the full amount, less tax.

Title to the equipment was intended to pass to the purchaser at F.O.B. point outside the state and, therefore, the purchase from the California vendor was a use tax transaction. This is supported by the fact that the purchaser, rather than the

GOODS DAMAGED, ETC. (Contd.)

vendor, filed a claim against the carrier. Accordingly, the use tax does not apply with respect to goods destroyed before the purchaser makes any storage or use of them in this state. Therefore, the purchaser may file a claim for refund of use tax collected from it by the vendor. 3/3/64.

290.0028 **Goods Damaged or Lost in Transit After Retail Sale.** Sales tax otherwise due is not reduced or eliminated when the goods are damaged or lost in transit after the retail sale. ''Sale'' means any of the events defined in section 6006, including the transfer of title to the goods. If the title to the goods being sold passes from the California seller to the California buyer before the intrastate transportation from the seller to the buyer, and the goods are totally destroyed during the transportation to the buyer, the seller owes the same full amount of the sales tax as if the goods had been received undamaged by the buyer. The buyer still owes the seller for the destroyed goods' price including sales tax reimbursement. That outstanding debt is equivalent to the loss experienced by the buyer. The buyer will expect full compensation from the carrier who was responsible for destroying the buyer's goods. It should be noted that in some circumstances of interstate transportation from an out-of-state seller to a California buyer, the use tax would be applicable rather than the sales tax. In those cases, no use tax would be due if the goods were totally destroyed during the transportation and before any receipt of the goods by the buyer, whether or not the title to the goods had passed to the buyer. 6/24/80.

290.0031 **Goods Damaged in Transit.** A firm purchases two electric motors which are damaged in transit from an out-of-state vendor. The motors are returned to the vendor for repairs. The vendor bills the purchaser for labor and materials on the repair plus the applicable tax. The purchaser then files a claim for the repairs against the freight company.

In this situation, tax is properly included in the claim against the carrier since it is part of the sales price of the materials used in repairing the damaged goods and tax is due on the sales price of the parts. The repair transaction is separate and distinct from the original sale or purchase.

As to goods damaged in transit which are accepted by the purchaser in their damaged condition, the transaction is a use tax transaction (i.e., the sale occurs outside the state). Accordingly, the correct measure of tax on this transaction is the fair retail value of the goods in their damaged condition. It should be noted that the amount of tax paid on materials for the repair is not necessarily equivalent to the goods in their damaged condition. 5/29/64.

290.0040 **Repairs.** Regulation 1629 provides means for determining sales tax on original sale of property which is damaged or destroyed. It does not relate to the applicability of sales tax to charges for repairs on such damaged property. Tax applies to the sale of materials used in such repair work. 3/28/57.

290.0060 **Replacement of Damaged Goods by Carrier.** Where a carrier purchases a replacement part for goods damaged in transit and furnishes such part to the consignee in settlement of a damage claim, it is a taxable retail sale to the carrier. Had the original retailer purchased the part and sold it to the consignee in

GOODS DAMAGED, ETC. (Contd.)

fulfillment of its warranty, the sale to such original retailer would have been a sale for resale and the subsequent sale to consignee would have been regarded as included in the original sale as a ''replacement.'' 3/24/53.

290.0080 **Replacement Parts.** A California concern purchases equipment out of state, which is shipped ''freight collect'' with risk of loss to be on the purchaser. During shipment certain parts were broken beyond repair. These parts were reordered and billed to purchaser including sales tax.

Assuming title passed to purchaser out-of-state, use tax liability accrues to purchaser. Since part of the shipment was damaged, the tax would be due only on that portion of the total amount paid represented by the fair retail value of the goods in their damaged condition. The replacement parts are properly subject to either sales or use tax. 2/21/55.

290.0100 **Replacement Parts.** Sales of repair parts used in repairing automobiles damaged in shipment where the automobiles are to be resold upon arrival at their ultimate destination, are sales for resale not subject to tax. It is immaterial whether the payment for such parts is made by the carrier or the owner of the automobiles. 9/30/53.

290.0150 **Resale Merchandise.** Resale merchandise shipped by a manufacturer to a retailer via a common carrier is damaged in transit. A credit is issued to the retailer, replacement merchandise is shipped, and a new billing is issued. The manufacturer bills the carrier for the damaged merchandise. The transactions with the retailer do not result in any tax liability because the original sale was nullified by the credit issued and the subsequent sale was a sale for resale. Assuming that the carrier acquires possession of and title to the damaged goods, tax applies to the portion of the amount paid by the carrier representing the fair retail value of the goods in their damaged condition unless the carrier issues a resale certificate and resells the damaged property. If the property is so badly damaged that is must be junked by the carrier, there is no tax on the billing to the carrier as the fair retail value of the damaged goods would be zero. 8/14/78.

GOVERNMENT RECORDS
Copies of, furnishing, see Service Enterprises Generally.

GROCERS
See Food Products; Reporting Methods for Grocers.

295.0000 GROSS RECEIPTS
See also Bad Debts; Barter, Exchange, "Trade-ins"; C.O.D. Fees; Sound Recording; Installing, Repairing, Reconditioning in General; Leases of Tangible Personal Property—In General; Photographers, Photostat Producers, Photo Finishers and X-ray Laboratories; Service Enterprises Generally; and Transportation Charges. Federal taxes, inclusion of, see Federal Taxes. Tips, see also Taxable Sales of Food Products.

GROSS RECEIPTS (Contd.)

(a) GENERAL

295.0020 **Adjustment of Purchase Price.** A manufacturer sells trailers to its wholly owned subsidiary, which leases the trailers to others. When a particular trailer is transferred to the subsidiary, the manufacturer makes out an invoice indicating an arbitrary amount as the selling price. At the end of the fiscal year, the manufacturer determines its actual production costs and charges the subsidiary the difference between the originally invoiced amount and an amount which includes all of the manufacturer's costs for overhead, labor, materials, plus an amount for profit. The adjusted selling price, including the additional charges for overhead, labor, materials, and profit, as redetermined by the manufacturer, is the taxable purchase price to the subsidiary. 10/11/67.

295.0022 **Advance Payments by Vendor.** A customer agrees to use a vendor as its exclusive supplier for the fabrication of positive release prints to be used by the customer in the distribution of motion pictures. The vendor will bill the customer at its regular list price. The vendor agrees to pay the customer a stated sum upon execution of the agreement. The vendor also agrees to pay the customer an amount equal to 15 percent of the total amount of all invoices. The amount is to be paid to the customer monthly.

Under these arrangements, the advance payment and the monthly payments are in the nature of an interest-free loan. Thus, the payments made by customer would consist of two components, the return of the advance payment and a payment for services rendered. In other words, the measure of tax consists only of the net amount paid by customer, which, in this case, is the contract amount less the return of the ''advances.'' 3/23/90.

295.0027 **Air Filters—Sale and Installation.** A taxpayer will furnish, deliver, and sometimes install air intake filters for heating and air conditioning systems. The customer will sign a one year contract for the furnishing and delivery, or for the furnishing, delivery and installation of filters. The drop-off service is $19, which includes delivery of the filter to the customer's door by taxpayer's service technician, but not installation. The installation service is $29, which includes furnishing, delivery, and installation of the filter by taxpayer's service technician.

The contract for the delivery of the filters for the $19 charge is for the retail sale of tangible personal property, and the full $19 amount billed to the customer for delivery of each filter will be subject to sales tax.

In this case it seems the difference between the $29 including installation fee and the $19 charged without installation is solely for ''labor or services used in installing or applying the property sold.'' The amount of this installation charge, $10, is not taxable pursuant to section 6012(c). However, $19 of the taxpayer's $29 charge to the customer is taxable gross receipts from the sale of the filter which the taxpayer installs. 7/14/95.

295.0029 **Art Direction, Standby, and Strike Labor.** The following are services performed in connection with the sale of a set used in commercials and are considered to be services that are a part of a sale of tangible personal property and subject to tax:

GROSS RECEIPTS (Contd.)

(1) Art Direction. Art direction consists of positioning the set and ordering any changes to the set during the shooting session.

(2) Standby. Standby is labor charges at the site to make any necessary changes to the set ordered by the art director.

(3) Strike. Strike is labor charges to disassemble and dispose of the set.

Any charges for adjustments or alterations to the set are charges for continued fabrication of the set for its use at the site. Art director facilitates the use of the set. Strike labor disassembles the set and disposes of it. As such, they are services intrinsically linked to the sale of the set. 6/15/93.

295.0030 **Auction Sales—Buyer's Premium.** A seller consigns goods for sale at auction, after agreeing to pay the auctioneer a certain percentage of the sale price. The auctioneer also announces to the buying audience that a 10% buyer's premium will be added to the purchase (bid) price, which will be retained by the auctioneer. If a person is the successful buyer of an item for a bid of $100, the buyer will pay to the auctioneer $110. The gross receipts from the sale include the buyer's premium. Tax applies to the entire $110 paid by the buyer to the auctioneer. 3/16/88.

295.0035 **Autographs on Baseball Cards.** The application of the sales tax to autographs on baseball cards is shown in the following situations:

(1) If a vendor sells a baseball card (value $5) and the pictured player is present to autograph the card (value $30), for one lump sum price of $35, the entire $35 is subject to tax.

(2) If a vendor sells a baseball card for $5 and as an option, the customer may pay an additional $30 to the vendor to have the player sign the card, sales tax applies only to the $5 charge for the baseball card.

(3) If a vendor sells a baseball card for $5 and then the customer takes the card to another table that is run by the show promoter where the player will sign the card for a $30 fee, sales tax applies only to the $5 charge for the baseball card. 12/5/90.

295.0035.180 **Balloons and Balloon Decorations.** A taxpayer operated a business which sold balloons, rented helium tanks and provided balloon decorations. Decorations consisted of balloon arches which were installed or assembled on site. Charges for materials and labor were separately stated. Although the decorations involved artistic workmanship, the labor charge was taxable as a charge for labor related to the sale of tangible personal property. 4/4/94.

295.0035.200 **Birthday Balloons.** A firm delivers balloons for birthdays or other special occasions. The person making the delivery is dressed in costume and delivers the balloons together with a song such as "Happy Birthday."

The sale is a combination sale of a nontaxable theatrical performance and a taxable sale of balloons. A reasonable allocation which represents the sale of the balloons should be made. 4/28/86.

GROSS RECEIPTS (Contd.)

295.0035.820 **Cash Redemption Value (Recycling Fee).** The Cash Redemption Value (CRV) fee applies to nonrefillable containers such as those used for beverages. The CRV is imposed upon the wholesaler, who passes the cost on to the retailer, who passes the cost on to the purchaser of the beverage. Therefore, the CRV amount is an expense to the retailer and a part of the ''gross receipts'' collected from its customer.

The CRV law requires the retailers to separately state the CRV amount in advertising and on shelf-pricing, and retailers are permitted (but not required) to add the amount as a separate amount at the cash register. The CRV amount is not a true deposit for sales and use tax purposes because the CRV amount is not returned by the retailer to the customer, but is recovered from a third party at the recycling center. There is no exclusion for the CRV amount from the measure subject to sales or use tax, even though those amounts may be itemized to the customer and the amount is therefore included in the measure of tax. 7/10/96.

295.0035.900 **Catalogs.** A company sells for resale various items of tangible personal property. It also sells catalogs of its products and advertising materials to its dealers, usually at retail. The dealers earn credits during the month based on the volume of purchases they have made (for resale.) The dealers can use these credits to reduce the charges they pay for the catalogs and advertising material. The measure of tax for the catalogs and advertising material sold at retail is the amount billed before the deduction of the credits being applied. 6/28/89.

295.0036.100 **CD ROM Replication.** A person's charges for duplicating computer programs provided by its customers onto one or more CD ROM's are subject to tax. 5/29/97.

295.0036.750 **Charge for Cleaning and Testing Returnable Containers.** A taxpayer is in the chemical distribution business. The chemicals are sold in returnable containers (poly returnable drums and totes). The taxpayer charges its customers a cleaning and testing fee of $5.00 per container. The containers will be cleaned and tested by the taxpayer's branch personnel at the branch where the container is returned by the customer. This charge is required, not optional. The fee will appear as a separate line item within the body of the invoice to the customer when containers are returned.

Since the $5.00 charge is required, the charge is a condition of purchasing the chemicals from the taxpayer and it is an integral part of the sale of the chemicals. Thus the $5.00 charge is a charge for services that are a part of the sale of the chemical and included in the measure of tax. In other words, tax applies to the total amount of the sale price of the chemicals sold to the customers, including the $5.00 charge for cleaning and testing unless the sale is specifically exempt from taxation by statute. 6/27/96.

295.0037 **Charges for Testing and Calibrating a Laser Printer.** A purchaser contracts with a vendor for a laser printer. The printer is connected to the purchaser's computer by the seller's technician. In addition to the hook-up, the technician tests and calibrates the printer. The charges for testing and calibration

GROSS RECEIPTS (Contd.)

are taxable, while charges for actual installation are not. The charges for the testing and calibration are taxable even if the seller contracts for them with a third party. 6/20/94.

295.0037.400 **Charitable Deduction.** A ticket for a wine and cheese tasting event to raise funds for a charitable organization was sold for $25. The ticket indicated that $15 was deductible as a charitable donation. Under these circumstances the $10 is the measure for sales tax purpose. 6/30/89.

295.0038 **Compensation From Advertisers.** Taxpayer publishes maps on behalf of a local Chamber of Commerce. No payment is received directly from the Chamber of Commerce, but the publisher is compensated out of proceeds from the sale of advertising on the maps. The Chamber of Commerce authorizes publisher to receive payment directly from the advertisers.

The publisher is selling the maps to the Chamber of Commerce and the amounts paid by the advertisers are paid on behalf of the Chamber of Commerce for the publications of the maps. The amounts received by the publisher from the advertisers are taxable gross receipts. 11/21/91.

295.0040 **Computer Billing Service.** A corporation specializing in computerized billing and management activities for law firms on a contractual basis for a monthly fee is not subject to sales taxes on the fee. Also tax-exempt is the initial charge made to convert the law firm to the new system. However, sales of statement paper bearing the law firm's letterhead to be used for billing are subject to sales tax, and as the retailer, the computer services firm would need a seller's permit. 7/30/76.

295.0045 **Conference Center Rentals.** A company has a conference center which it rents to individuals or companies to hold seminars/conferences. At the conferences, meals are optional and available at a separate charge.

Assuming that the patrons pay the same rental rate whether or not meals are purchased, charges for rental of its conference center are not included in the gross receipts from the sales of the meals. 4/7/92.

295.0050 **Confidential Shoppers.** An owner of restaurants is selling meals to individuals under contract to it to operate as confidential shoppers at its selected restaurants, notwithstanding the individuals provide the owner with a report of the quality of the restaurants visited and are fully reimbursed for the meals purchased. 11/24/76.

295.0060 **Confiscated Receipts.** Receipts from bar sales which have been confiscated by a keeper placed on the premises by creditors of a preceding manager are includible in the taxable gross receipts of the present manager since the sales were made by an employee of his while he was managing the business. The tax is imposed upon the privilege of selling tangible personal property at retail and hence the disposition of the money after the sale would not alter the tax liability. 6/15/65.

GROSS RECEIPTS (Contd.)

295.0064 **Consulting and Architect Services.** The taxpayer, a licensed architect, contracts to assist a customer in facility planning, designing, scheduling, budgeting, contracting, and purchasing of furniture and equipment for expansion into new facilities. The furniture and equipment placed in the new facility consist of existing used items transferred from existing facilities and items purchased and resold by the taxpayer to its customer at cost. The taxpayer hires independent third party service providers to install and assemble the new and used furniture and equipment at the new facility. The taxpayer separately bills the customer for the installation charges of the third party service providers.

Under these facts, the taxpayer may deduct from taxable gross receipts its charges for professional consulting and architectural services. However, all of the taxpayer's charges which are related to the acquisition and sale of the furniture and equipment are includable in the taxable gross receipts without any deduction for the cost of the property sold, the cost of materials used, labor, or service cost or any other expense. Thus, the measure of the sales tax of the furniture and equipment would be taxpayer's cost plus its charges related to the sale of the furniture and equipment.

The taxpayer may deduct from the gross receipts the charges for the third party service providers installing the furniture and equipment, but charges for assembly are includable in taxable gross receipts. 1/13/94.

295.0065 **Consulting Services.** Separately stated charges for consulting services by a machine shop made in conjunction with the fabrication of parts by the shop are part of gross receipts subject to tax.

Charges for consulting where no products are delivered are not subject to tax. 6/30/62.

295.0070 **Contracts Sold at Discount.** A used car dealer is required to remit the full sales tax computed on the purchase price of a used car and not on the discounted sale price of the contract sold to a third party. 8/22/74.

295.0080 **Contributions to Charitable Organization.** A charitable organization, which distributes special books printed in oversize type to school districts, libraries and institutions for use by partially-sighted children, purchases the book components tax-paid. It solicits contributions for its cost from distributees and others, but distributees are under no obligation to make contributions.

Inasmuch as the organization's receipts from distributees' contributions are substantially less than its cost of book components (15 percent) and distributees are not obligated to make contributions, the organization is the consumer of the books and not the retailer thereof and the contributions are not taxable gross receipts. 10/4/65.

295.0090 **Co-Op Fees.** Members of a buying group are required to pay an annual membership fee. In addition, members are required to pay an additional forced amount, with each purchase, for the purpose of enhancing the working capital of the Co-op. Members can receive a refund of the additional charge, if the amount

GROSS RECEIPTS (Contd.)

paid exceeds the required minimum based on their level of participation or if they leave the Co-op. The additional forced amounts, charged with each purchase are ''gross receipts'' and includable in the measure of tax. 12/14/89.

295.0100 **Copy Charges.** A company which publishes an annual directory in which selected firms of attorneys publish a professional card and receive a copy of the directory for a charge which is based upon the population of the city or town in which a firm is located is furnishing both a service and selling tangible personal property (copies of the directory). Part of the purpose of such a directory is to enable those firms which receive the directories to use them when they need to locate counsel in other areas. The company is liable for that portion of gross receipts which are attributable to the publication of the directory, but, since it makes no charge for the replacement of lost or damaged directories, it has no replacement cost. Hence, the measure of the tax is the publishing firm's cost of publication. 4/22/69.

295.0101 **Copying Charges.** The single per-copy charge for the use of a tax-paid copy machine by another person is taxable because the charge is for the transfer of title to the copy. 9/5/76.

295.0120 **"Corkage."** Opening and serving customer-furnished champagne constitutes a sale, and charges for this are includible in taxable gross receipts. 8/4/67.

295.0140 **Correspondence Courses.** Tax applies to books and lesson materials furnished to students in connection with a correspondence course. If the price of the books and materials is not separately stated, the tax applies to their fair retail selling price. The school may purchase all such books and materials for resale. Tax does not apply to books and materials mailed to an out-of-state student. 10/23/53.

295.0153 **Coupon Incentive Plan.** In compliance with an order by the California Public Utilities Commission to establish programs that encourage the conservation of natural gas, a utility company proposes to establish a coupon incentive plan. Under this plan, the utility company will distribute coupons to its customers which can be used to reduce the purchase price of certain energy saving measures at participating retail stores. The retailers will reduce the cost of the item by the redemption value of the coupon. They will then be reimbursed by the utility company for the face value of the coupon plus a small handling fee. The utility company itself may sell certain of the items to purchasers on the same basis as sales made by other retailers.

The application of the sales tax to sales of energy saving measures sold by the utility company and by participating retail stores is as follows:

(1) The utility company as retailer: The utility company does not receive its full selling price on the sale. The price is discounted to the extent of the value of the coupon issued by the utility company to its customer. Taxable gross receipts of the utility company are therefore the retail price reduced by the value of the discount allowed and taken on the sale. (Section 6012(c)(1).)

GROSS RECEIPTS (Contd.)

(2) Sales by participating retail store: The retailer receives the full selling price of merchandise from the customer (i.e., cash plus a coupon redeemable at full value from the utility company.) The gross receipts of the retailer includes the cash received as well as the coupon value. 6/25/81.

295.0160 **Coupons** sold through solicitors for which photographer allows a credit upon purchase of photographs, amount charged for is part of gross receipts from sale of photograph. 4/4/50.

295.0168 **Court Ordered Settlement.** Amounts returned to a buyer pursuant to a court ordered settlement are not considered price adjustments which alter the original sales price, but rather are in the nature of damages. 9/13/89.

295.0175 **Coupons Received in Settlement of Law Suit.** In settling a class action case, an association agreed to issue coupons with a face value of $150 which the plaintiffs could use as payment towards a purchase or lease of a vehicle. The coupons may be redeemed at any dealer who is a member of the association. These coupons are in the nature of third party coupons and derive their values from the settlement agreement. It is not a voluntary reduction in price. Additionally, the cost of the redemption is to be shared in whole or in part by the association. The coupons represent taxable gross receipts. 5/16/97.

295.0180 **Credit To Be Issued to a Customer** due to the fact that the full order was not shipped should include credit for the sales tax on the amount of the adjustment, as this situation should be regarded as the correction of a mistake, with the tax applying only to the corrected amount. 12/15/52.

295.0200 **Customer-Furnished Equipment Included in Sales Contract.** If a customer delivers the bill of sale for equipment owned by him to a dealer who sells new equipment to the customer under a sales contract, and the proceeds from the finance company in excess of the price of the new equipment are remitted to the customer, the sales tax applies only to the price of the new equipment. The customer's property included in the sales contract provides the finance company with additional security and it is not in any realistic sense sold by the dealer to the customer. Since the sales contract, as reported to the finance company, is sought to be disregarded, the dealer should keep sufficient documentary evidence to show the actual facts. 12/26/58.

295.0210 **Damages.** The stated contract price for the sale of tangible personal property is the measure for establishing sales or use tax despite the existence of a liquidated damages clause in the sales contract for breach of various terms contained in the agreement. An award for breach based upon a liquidated damages clause has no effect on the sales price, itself. 7/30/76.

295.0215 **Deposits Required by County Animal Shelters.** Deposits required by county animal shelters as payment to purchase an animal to ensure that the animal is spayed or neutered are part of gross receipts and are subject to tax. If the purchaser does have the animal spayed or neutered, the county animal shelter

GROSS RECEIPTS (Contd.)

refunds the deposit to the purchaser. The amount collected from the purchaser as ''sales tax'' must also be refunded. 8/12/97. (M98–3).

(This opinion was superseded by section 6010.40, operative January 1, 2000.) (Am. 2000–2).

295.0220 **Disposition of Gross Receipts, Effect of.** When a painting is sold for a stipulated price, the artist receiving part of the selling price and a charitable organization receiving the remainder, the sales tax applies to the total price. The disposition of the proceeds of a sale does not affect the application of the sales tax to the gross receipts from the sale. 2/11/66.

295.0222 **Document Delivery Service By University Law Library.** A university law library will start a document delivery service to local law firms. A standard fee of $7.50 will be charged for each item requested, plus $.25 for each photocopy made. $1.00 will be charged for postage and handling. If the photocopies are faxed, a charge of $.75 for each page faxed will be added. Rush or off-hour requests also have a special additional charge.

Tax will apply to the standard fee of $7.50 and to the $.25 per page charge for the photocopies. Tax also will apply to the special additional charge for rush and off-hour requests. If a separately stated charge is made for ''postage and handling,'' only that portion of the charge which represents actual postage may be excluded from the measure of tax, in accordance with Regulation 1628.

When the printed material is transmitted over telephone lines by fax and no photocopy is provided, tax does not apply to the amount charged. It (faxing) is considered a nontaxable service. 10/30/89.

295.0225 **Driver Source Code.** Company A is planning to contract the development of a software product from Company B. Company B will purchase an unlimited source code for Company A from the manufacturer, modify the driver source code, and deliver the original and modified source to Company A at project completion.

It appears that Company B merely acts as an agent on behalf of Company A in acquiring the program from the manufacturer. If this is true, the relevant transaction is the transfer of the program from the manufacturer to Company A. Tax does not apply to the amount paid for the license or royalties by Company A to the manufacturer for the transfer of the program to Company A if the transfer is to provide Company A with the right to reproduce and copy a program to which a federal copyright attaches in order for Company A to publish and distribute the program regardless that Company A has Company B modify the program to be compatible with Company A's application. 8/31/92.

295.0228 **Environmental Drum Cleaning Fee.** A taxpayer sells petroleum products and collects a separately stated amount identified as environmental drum cleaning fee on each 55 gallon drum that it delivers with product to purchasers as reimbursement for associated reconditioning and environmental cost. This fee is taxable as a charge for a service in connection with a sale. 8/14/96.

GROSS RECEIPTS (Contd.)

295.0231 **Firewood.** The sale of firewood is subject to tax. 2/3/94.

295.0235 **Flower Arranging.** Charges for making or fabricating flower arrangements are subject to tax as services which are part of the sale of the flowers. Charges for services such as visits to the site, consultations with customers, design, layout, and rentals of equipment are taxable. 7/6/94.

295.0260 **Fungible Goods Credit.** For the manufacturer of drill bits, ''used'' industrial diamonds are fungible with ''new'' diamonds of similar size and quality. Usable diamonds salvaged from customers' returned drill bits are credited to their accounts by carat weight and commingled with similar diamonds held by the bit manufacturer. Under these circumstances, the caret weight credit may be regarded as a return of the customers' diamonds, and excluded from gross receipts, when it is applied against the weight of diamonds in a subsequent sale of a newly manufactured bit to that customer. 5/29/69.

295.0270 **Gross Receipts From Sales of ATM Machines.** A premium is added to the retail sales price of an ATM machine based upon the desirability of its location. If the ATM machine is sold as tangible personal property, the premium must be included in the taxable gross receipts. 4/2/01. (2002–1)

295.0290 **Growing Fees.** Fees for growing plants or trees are not subject to tax as fabrication labor. However, if the seller of the seeds or seedlings purports to transfer title for a stated unit price and further contracts to grow and raise the seedlings to a transplantable stage for an additional unit price, such charges are part of the sale of tangible personal property. The true object of the two contracts is for the transfer of a transplantable tree. On the other hand, if a person sells transplantable trees, but extenuating circumstances prevent the buyer from taking delivery (e.g., lack of field preparation), additional optional charges for maintaining the trees are not includable in the measure of tax. (See also annotation 515.0720). 5/4/71; 10/19/73; 4/17/78.

295.0300 **Guaranteed Profits.** As an incentive to new service station operators, an oil company guarantees the monthly profit of the operator by paying him the difference between the guaranteed profit and the actual profit if the actual profit is less than the guaranteed profit. The difference paid by the oil company to the operator is not part of the service station's taxable gross receipts because the payment is neither directly related to the sale of the gasoline nor a consideration for the transfer of title to the gasoline. The payment is more in the nature of a rebate payment than a subsidy because the oil company is the principal vendor of the operator who retails the gasoline. 10/22/69.

295.0308 **Hand Distributing of Advertising Materials.** A taxpayer is in the business of printing advertising material for customers and hand distributing the material which it prints. The agreement to hand distribute some or all of the material printed is included in the original bid. A formal contract is not written; however, the bid is signed by the customer.

The taxpayer hires families to distribute the material door-to-door. The customer generally indicates the area where the material should be distributed.

GROSS RECEIPTS (Contd.)

Under section 6012, taxable gross receipts include the total amount of the sales price of retail sales without any deduction on account of the cost of the transportation of the property with one exception which is contained in subdivision (c)(7) of section 6012. That exception pertains to separately stated transportation charges and if by facilities of the retailer, the transportation must occur after the sale of the property is made to the purchaser. In this case, there is no ''explicit agreement'' that title passed to the purchaser prior to delivery. Therefore, sales tax applies to the total gross receipts including the charge for hand distributing the material. 12/7/83.

(Note subsequent statutory change re printed sales messages)

295.0315 **Hospital Cooperatives.** An entity provides product standardization, cooperative purchasing and centralized distribution services to hospitals which become members. As long as the hospitals participate only as consumers and do not purchase items for resale from the entity, the entity will qualify as a consumer cooperative, inasmuch as the hospitals are consumers. Under the statute, ''consumers'' are not limited to natural persons. Thus, a cooperative may be formed by legal as well as natural persons. However, such persons must participate in the cooperative only as consumers. 5/31/94.

295.0320 **Hostess Credits.** Retailers giving credit to hostesses for holding parties, inviting friends, and delivering merchandise, may not deduct the amount of the credit from the measure of tax. The efforts of the hostess are bargained for and given in consideration of the credit. Cancelling the credit in return for merchandise constitutes consideration for the transfer of the property and represents taxable gross receipts at the value placed on the credit by the parties. 3/7/66.

295.0325 **Hostess Premiums.** A company's brochure pictorializes to the hostess the merchandise that can be earned under the various premium awarding categories. Each item of merchandise has a dollar value printed under its picture. The majority of the premiums are also available for purchase through the customer catalogue at the same amount as the premium is valued to the hostess. There is no other written or oral agreement between the parties regarding the valuation of the premium. The sales representative earns an average 35% commission on all orders taken.

The measure of tax for sales of premiums by the company in exchange for classes or sales parties provided by the hostesses is the value of the service performed by the hostess in exchange for the various items sold by the company to the hostess. The premium catalog which the company provides to prospective hostesses lists the various premiums available to the hostess for giving classes, and the catalog designates a dollar value for each premium. The catalog value generally equates to the company's retail price of the product. Absent any express agreement as to the value of the services provided by the hostess, the stated values of the premiums represent the value of the services as arrived at by the free negotiation of the parties. 5/6/86.

GROSS RECEIPTS (Contd.)

295.0330 **Hostess Premiums Exchanged For Services.** Where hostess premiums are exchanged for services, absent any express agreement as to the value of the services provided, the stated value in dollars of the premiums in catalogs represents the value of the services as arrived at by the free negotiation of the parties. This stated value is the gross receipts from the sale of the premiums. 5/6/86.

295.0340 **Independent Contractor.** The sales tax applies to the weekly retainer paid by newspapers to a photographer as independent contractor rather than as employee, who is paid on an hourly basis regardless of the number of pictures taken, and delivers exposed film to the newspapers. 11/6/57.

295.0350 **Indian Sales Tax.** A non-Indian makes retail sales of tangible personal property to non-Indians on an Indian reservation. The Indian reservation imposes a sales tax on these sales. The Indian tax which is added to the sales price is regarded as part of gross receipts which are subject to tax. No credit for the Indian tax is allowable under section 6406 of the Revenue and Taxation Code. 2/4/94.

295.0360 **"Inflated" Down Payment.** A vehicle is sold for $1,000 but contract shows purchase price of $1,500 with a $500 down payment. The $500 is never in fact paid by the purchaser nor is it ever intended that it should be paid. Transaction is handled in this manner for the purpose of obtaining financing from a finance company.

If there is no trade-in, the measure of the tax is $1,000 unless customer is charged sales tax on $1,500, then the $1,500 becomes the measure of the tax.

If property is traded in as part payment of the price, the measure of the tax is the full $1,500.

In some cases, the sales price may be written down and the entire down payment not shown on the contract. For example, upon the sale of a $1,500 vehicle with an $850 down payment, the contract will reflect a purchase price of $1,000 with a $350 down payment. However, since seller has received $850 plus purchaser's promise to pay an additional $650, the measure of the tax is the full $1,500. 3/12/54.

295.0361 **Installation and Testing Charges.** A manufacturer purchases equipment specifying that title will pass following installation by the seller and successful on site testing. Separate charges are made by the seller for installation and for testing. Installation charges are not subject to tax, but testing charges are. 6/20/94.

295.0362 **Intercompany Transfer.** Company C extended substantial credit to Individual B as well as company T and company R, both of which were owned by Individual B. Company A, which was an affiliated corporation of Company C, leased equipment to Companies T and R as part of an accommodation to its affiliate C.

Subsequently, Companies T and R defaulted under their lease agreements with A. Since the leases were entered into by A as an accommodation to its affiliate company C, C made an inter-company transfer of approximately $315,000 to A.

GROSS RECEIPTS (Contd.)

This amount represented the balance of A's investment in the leases. A, in turn, assigned to C, on a nonrecourse basis, all of its interest in the leases.

The inter-company transfer of the $315,000 was not a bargained for exchange for the assignment of the lease and the underlying property, particularly in light of the leased equipment being abandoned. Rather, it represented a prior promise to pay off the lease if the lessees defaulted. However, C did receive title to the leased property. Accordingly, a portion of the payment was for the property. The amount attributed to the gross receipts from the sale is the salvage value of the property. 4/16/91.

295.0365 **License to Use Music Furnished for Reproduction on Customer's Tapes.** An owner of tape recorded music who has not paid tax or tax reimbursement on the finished tapes at the time he acquired them makes a taxable lease of the tapes and the measure of tax includes charges for a license to use the music where he furnishes the tapes to a customer or to a sound laboratory at the direction of the customer with the understanding that the sound laboratory will record the music on tapes furnished by the customer and bill him accordingly, that the original tapes will then be returned to the owner, and that the owner will charge the customer for a license to use the music.

The same result follows where the owner rents the tapes to a customer for a specified, annual charge and then charges him also for a license to use the music when and if such use is made.

The charges by the sound laboratory are also subject to tax. 11/12/74.

295.0366 **Licensing Agreement.** The transfer of existing designs to a clothing manufacturer including the license to reproduce the design in the manufacturing process is a sale of tangible personal property. The total amount received including royalties based on the amount of clothing sold is includable in gross receipts and subject to tax. 4/20/94.

295.0367 **Liquidated Damage Payments.** A firm contracted to fabricate and install an electrical transformer. The contract was for a lump sum and provided for liquidated damages to be deducted from the contract price for late completion.

Liquidated damage payments or credits do not reduce the gross sales price for sales and use tax purposes. They are a convenient formula for determining civil damages payable for breach of contract. (Revenue and Taxation Code 6011 & 6012). 6/23/93.

295.0368 **Liquidated Damages.** The stated contract price of tangible personal property sold is the ''sale price'' subject to use tax without regard to the fact that a break of certain terms of the contract by the seller may occasion the operation of a liquidated damages provision. The selling price of tangible personal property is not affected by an award of damages resulting from litigation concerning the contract or by a payment by the seller to the purchaser in settlement for claims for damages by the purchaser. (See *Southern California Edison Co.* v. *State Board of Equalization* 7 Cal.3d 6521). This same rule applies even where the parties

characterize the settlements as ''voluntary price adjustments.'' A liquidated damages provision may not be regarded for sales and use tax purposes as a pricing mechanism. 7/30/76.

295.0370 **Lump-Sum Contract.** The total contract price for the purchase of glass laminating manufacturing equipment from an out-of-state seller was subject to use tax, even though part of the price was designated as payment for trade secrets, know-how, and technical information, because there was a single integrated agreement for the sale of the machinery and ''know-how.'' 11/19/70.

295.0373 **Lump-Sum Fee Includes Audio and Video Tapes.** A taxpayer is engaged in operating and franchising weight loss centers and providing customers with individual counseling, lifestyle classes, and reference materials on weight loss and weight maintenance. Food is purchased separately and sales tax is paid on the sale of taxable food products. A one time fee is presently charged to customers, varying from $19 to $79 depending on whether there is a promotional program in effect.

The taxpayer is now considering charging a lump-sum fee of $199 which will entitle customers to individual counseling lifestyle classes, extensive reference material, audio tapes and video tapes. Currently the audio tapes are sold separately and the video tapes are not offered for sale. The cost of the tapes is $9.00 for the audio tapes and $11 for the video tapes.

Based on this scenario it is clear that the increase in the one time fee is related to the sale of the audio and video tapes. Therefore, the substantial portion of the proposed fee is attributable to the transfer of tangible personal property, and thus, the entire fee is subject to tax as gross receipts from the retail sale of tangible personal property. 1/12/94.

295.0377 **Manufacturer's Fuel Cost Reimbursement to Dealers.** A vehicle manufacturer has a program where its dealers are to ensure that customers receive a full tank of fuel with the purchase of a new vehicle. Dealers are reimbursed for their cost, based on the difference between the vehicle's fuel tank capacity and the number of gallons placed in the tank at the factory. Gasoline in the tank of a vehicle at the time of sale is considered to be sold as part of the vehicle because title and possession of the fuel transfers to the buyer along with the vehicle. In this situation, the manufacturer is asking dealers to promote the program by requiring a full tank of fuel with the sale of all new vehicles. The credit granted by the manufacturer under the above fuel tank program should be characterized as an adjustment to the purchase price of the vehicle and not part of the dealership's gross receipts. 7/13/88; 5/20/96.

295.0378 **Manufacturer of Circuit Board.** The manufacturer's testing of circuit boards is a part of its manufacturing process in order to sell or lease the board to its customers. Therefore, tax applies to its charges for testing whether or not these charges are separately stated on the manufacturer's invoice to its customer. 6/25/97.

GROSS RECEIPTS (Contd.)

295.0379 **North Atlantic Treaty Status of Forces Agreement (NATOSF).** A member of Spain's Air Force claims that his purchase of an automobile from a dealer is not subject to sales tax pursuant to Article Ten of the North Atlantic Treaty Status of Forces Agreement (NATOSF). The NATOSF agreement provides NATO personnel who are members of a force under the NATO Agreement may have an exemption from taxation on salary and tangible movable property, that is, from annual recurring taxes such as ad valorem taxes and personal property taxes based on residence or domicile of the taxpayer in this state. Since sales tax is not based upon residence or domicile within a state, but upon transfer of title of property for a consideration, the sale of the automobile is subject to sales tax.

Also, the purchaser's claim that his purchase of the automobile is not subject to tax under Articles 47 and 59 of an agreement between the United States and Spain signed on December, 1988 is not valid. This agreement provides an exemption from Spain's value added tax and import duty taxes for members of the force or civilian components while serving in Spain, and these Articles are inapplicable to a transfer of title to an automobile in California. 9/30/94.

295.0380 **Option to Buy Coins.** When a buyer exercises an option to buy coins, tax applies to the sale since the title of the tangible personal property was transferred to the buyer. Both the price paid for the option right and the price paid to exercise the option are included in the retailer's taxable gross receipts from the sale. If the option is not exercised, the transaction is not taxable, since there is no transfer of title to the property. 5/12/65.

295.0400 **Option to Purchase.** Taxpayer leased a Bailey Bridge to lessee. The bridge subsequently collapsed. The lessee elected to pay for the loss by exercising an option to purchase the bridge rather than repairing and returning the bridge intact. The lessee merely minimized its damage loss by exercising the purchasing option. The correct measure of the tax is the fair market value of the salvage material and not the full ''purchase'' price. 12/3/62.

295.0408 **Option to Purchase Price—Leased Equipment.** A lessor acquired certain equipment and paid sales tax reimbursement to the vendor. The equipment was then leased for a term of 60 months. The lessee was given an option to purchase the equipment for $1,000 plus sales tax of $60. However, the lessee decided to purchase after the first twelve months. The lessor required a payment of $9,510 plus the option to purchase price of $1,000 and the $60 sales tax on the $1,000.

Under this scenario, the lessor and lessee have entered into a new contract which is to transfer title to the lessee and that tax applies to the entire amount paid by the lessee for transfer of title, less the amount of $60 that is intended as sales tax reimbursement. Accordingly, the measure of tax on the sale is $10,510. 8/7/78.

295.0420 **Out-of-State Fabrication.** A fabrication contractor entered into a contract with the City and County of San Francisco to assemble and install in California two generators the parts for which were to be shipped from Germany.

GROSS RECEIPTS (Contd.)

However, the contractor had the generators fully fabricated in Germany before shipment to California. The fabrication labor which the contractor purchased in Germany and resold in San Francisco as part of the fabricated generators was subject to sales tax because the intangible labor was for fabrication of tangible personal property. Fabrication charges for labor performed in California and included in the purchase price of the generators would also be taxable if the fabrication were done by the contractor in California. 2/4/70.

295.0421 **Pager Activation Fees.** A taxpayer sells a variety of merchandise including pagers which the taxpayer purchases from a service supplier. A customer may go to any service supplier for activation but the taxpayer's sales clerks encourage customers to complete a written service agreement with the service supplier from which it purchases the pagers. Under the carrier agreements, the customers agree to pay the service supplier a monthly fee for air time and a one time $10.00 activation fee. If the customer enters into a service agreement at time of purchase, the taxpayer's sales clerk faxes the agreement to the service supplier for immediate approval and activation of the pager which occurs within thirty minutes after receipt of the fax by the service supplier.

The taxpayer charges and collects the $10.00 activation fee from customers who enter into the service agreements at the taxpayer's stores. A customer who does not enter into an agreement is not charged the fee. The taxpayer remits the activation fee to the service supplier. The service supplier does not reimburse the taxpayer for this service. The service supplier does, however, give a volume discount to the taxpayer based upon the number of pagers it sells.

In this case, the taxpayer charges the same price for the pager whether a customer elects to activate through the taxpayer or not. The taxpayer separately states the charges for optional activation fees on its sales receipts to the customers and the activation does not modify or alter the pager in any manner. In other words, the activation does not involve fabrication or assembly of the pager. Thus, the charges for the activation fees are not taxable. (Section 6012(b)(1).) 6/8/94.

295.0422 **Party Organizer.** A taxpayer is in the business of organizing parties and special events for a fee at which meals, balloons, party favors, or entertainment is furnished to clients. The taxpayer subcontracts the meals to a caterer and pays tax reimbursement to the caterer. It also pays tax reimbursement on the other tangible personal property it purchases (e.g., balloons). The taxpayer is the retailer of the tangible personal property furnished, including meals the taxpayer purchases from a caterer.

The portion of the taxpayer's fee which is related to the sale of tangible personal property including the meals is subject to tax, while the portion attributable to entertainment is not subject to tax. 4/17/95.

295.0425 **Publishing Fees.** A California corporation publishes a book of poems once or twice a year. A poet who wishes to have his/her work appear in the book, pays fees to have the poem, any accompanying photographs, and dedications published, but these fees do not entitle the poet to a copy of the book.

GROSS RECEIPTS (Contd.)

The fees to have poems, photographs, and dedications published are for the purpose of defraying publishing costs and not for the purchase of tangible personal property. Therefore, the fees are not subject to tax. 8/13/90.

295.0427 **Purchase of Property from Proceeds from Forfeited Property Sales.** Tax applies to the sale of tangible personal property to a law enforcement agency which is paid for from proceeds from sales of forfeited property to the same extent as in any other transaction. 4/14/93.

295.0430 **Redemption of Coupons.** Amounts paid by a manufacturer to a retailer in redemption of coupons pursuant to an agreement permitting the retailer to publish the coupons in newspapers and handbill advertisements to be used by the retailer's customers in purchasing the product of the manufacturer, are includable in the retailer's gross receipts. 5/9/73.

295.0432 **Reimbursement for Replacing Property.** A customer contracts with a printer for a job order. After completion of the work, the printer forwards the printed matter to a graphic artist to put the finishing touches on the job. Due to defective work performed by the graphic artist, the job order must be redone. The graphic artist pays for the cost of replacing the printed matter and the customer is billed only for the original specified price. Under these circumstances the act of redoing the original order has no tax consequences to the printer. Tax applies only to the amount billed to the retail customer since it is for the transfer of title to the printed matter.

If the graphic artist must reimburse the retail customer for the amount of the printing order, there is no tax due on this amount. The payment of such reimbursement by the graphic artist is in the nature of ''damages,'' not the sale of tangible personal property. Again, tax applies only to the amount billed by the printer to the customer on the original order. 5/5/93.

295.0435 **Replicas of Original Artwork.** A firm purchased bronze plaques created by an internationally known artist. It plans to make reproductions of the plaques for sales to ''sponsors'' who will donate them to schools. Although these reproductions are ''works of art'', they do not qualify for the exemption from tax, as ''original works of art,'' provided by Revenue and Taxation Code Section 6365. The exemption is limited to the original artwork itself and does not apply to reproductions. As such, the gross receipts from the sales of these replicas, are subject to tax. 11/9/89.

295.0440 **Retail Selling Price** referred to in second paragraph of Section 6007 is selling price charged by out-of-state retailer to consumer, not the charge made by deliverer to out-of-state retailer. 2/6/52.

295.0462 **Royalties.** A contractor purchases equipment to manufacture and erect highway barriers. The contractor also contracts for the seller to provide assistance in using the equipment at a fixed rate per linear foot of barrier. The charge for assistance is not a royalty and is not a part of the sale of the equipment. The charge was for the providing of skilled workmen and is not related to the right of

GROSS RECEIPTS (Contd.)

the buyer to use the equipment. Accordingly, the charges for the ''per linear foot of barrier'' are not subject to tax. 10/29/75.

295.0480 **Royalties.** Where the licensee of a patented process was required to lease certain equipment in connection with the use of that process, the license fees or royalties, as well as the equipment rental receipts, are subject to tax since it appears that the licensee could not use the equipment for the purpose for which it was intended without paying the royalties. 9/21/66.

295.0520 **Royalties.** Royalties required to be paid to vendors in connection with the commercial use of canning machinery, are includable in taxable gross receipts. 2/19/54.

295.0540 **Royalty Charges** for use of music on a sound recording motion picture are part of the sales price of the picture and includable in gross receipts. 5/10/54.

295.0545 **Royalty Fees.** A taxpayer publishes magazines which advertise real property for sale by independent brokers or others. The taxpayer grants exclusive franchises in specified geographical areas for the publication and distribution of the magazine. The property advertised in the magazine is limited to the franchise area. The franchisees pay taxpayer a fee, based on the number of pages, to publish the magazines. In addition to this fee, the taxpayer charges franchisees a ''royalty fee'' based on a ''percentage of the suggested retail price for the pages of advertising.'' The royalty fee is for ''intangible rights such as the exclusive territorial rights, logos, trade marks, etc.'' The ''royalty fee'' is charged whether or not the taxpayer does the printing.

GROSS RECEIPTS (Contd.)

The ‘‘royalty fees’’ are part of taxable gross receipts when the taxpayer does the printing for the franchisees. Where the franchisees do not purchase printing from the taxpayer, the ‘‘royalty fees’’ are not taxable since there is no sale of tangible personal property. Additionally, if the publication qualifies for tax exemption either as ‘‘periodicals’’ or as ‘‘printed sales messages,’’ the ‘‘royalty fee’’ would be nontaxable. 10/26/90.

295.0557 **Royalty Payments.** A taxpayer sells equipment used in a manufacturing process. The equipment is supplied by a manufacturer who holds the patent on the equipment. After the sale of the equipment by the taxpayer, the manufacturer enters into a separate license agreement with the purchaser. Pursuant to that agreement, quarterly royalty payments for the use of the equipment are paid by the purchaser to the manufacturer. The taxpayer collects the royalty payments on behalf of the manufacturer and is compensated for the collection work by retaining 15% of the royalty payment as a commission.

Royalty payments received in connection with a retail sale of the patented equipment are included in retailer’s gross receipts. In this case, the purchaser could not use the equipment without paying royalties to the manufacturer who holds the patent on the equipment. Under such circumstances, sales tax is measured by the total amount of the sales price of the equipment, including 100 percent of the royalties paid by the purchaser of which 15 percent is retained by the taxpayer. As the retailer of the equipment, the taxpayer must report the royalty payments in the quarter in which the payment becomes due. 6/20/96.

295.0560 **Royalty Payments Based on Units Produced.** Where the inventor of a log peeling device had a peeler fabricated by a machinery company and sold it to a logger pursuant to a contract under which the logger paid a fixed sum for the peeler plus a royalty based on the number of board feet of lumber peeled, the royalty payments constituted part of the taxable selling price of the peeler. Where the inventor granted permission to a machinery company to fabricate a log peeler and to sell it ex tax for a fixed sum to a leasing company, which leased it to a logging company for a stipulated rental, in addition to which the logging company agreed to pay the inventor a royalty based on the number of board feet of lumber peeled, the royalty payments constituted taxable rental receipts. 11/1/65.

295.0570 **Royalties.** The transfer by an artist of original artwork prototypes for use in manufacturing replicas is regarded as a sale under Section 6006 and Regulation 1501. Where the consideration for the transfer is royalty payments based on a percentage of the selling price of the replicas as and when sold in the future, such royalties constitute the gross receipts from the sale and are the measure of the sales tax. Therefore, the three-year statute of limitations does not commence to run until the time the consideration is paid. The artist should report the royalties as received, that is, in the quarter in which the amount is made definite. (See *Burnet* v. *Logan,* 283 U.S. 404 [1930].) 1/4/79.

GROSS RECEIPTS (Contd.)

295.0570.650 **Sale of Orthotics and Prosthetic Devices.** Taxpayer is in the business of providing orthotic and prosthetic devices which are custom fit by the taxpayer's licensed professionals to meet the needs of each individual patient. All sales are made under prescription from the patients' physician. The direct material costs equal or slightly exceed direct labor costs, but the charges are commingled for acceptance by Medicare/Medicaid and private insurance carriers. That the taxpayer's customer may be reimbursed by a medical insurer is not relevant to the determination of whether taxpayer is making an exempt sale. If the sale does qualify for exemption, the taxpayer should obtain from the purchaser an exemption certificate conforming to the requirements of Regulation 1667 and retain it in its own records to support the exemption. If the sale is to Medicare A, it is a sale directly to the United States and is exempt from tax. However, if the patient is reimbursed under Medicare B, that is a sale to the patient, the normal taxation rules apply to determine if the sale was subject to tax. When the sale is not exempt, the taxpayer's entire charge is subject to tax. Whether separately stated or not, the taxpayer may not deduct its charges for fitting because the fitting devices are part of the taxable sale of taxpayer's tangible personal property. 4/19/96.

295.0570.800 **Sales of Assets Acquired through Asset Forfeiture Laws.** Tax applies to sales of tangible personal property acquired through asset forfeiture laws to the same extent as any other transaction. 4/14/93.

295.0571 **Sales to Cities.** Sales by retailers to cities (and other political subdivisions) within the state of California are subject to sales tax. Such entities are within the section 6005 definition of 'person' and there is no statutory exemption for sales to them. Section 6091 provides: ''. . . it shall be presumed that all gross receipts are subject to tax until the contrary is established.'' The retailer's right to reimbursement for the tax he must pay is governed by Civil Code section 1656.1, which deems it to be a contractual matter. However, regardless of whether the contract does or does not allow for reimbursement, the retailer is liable for payment of the tax on taxable sales. 6/28/89.

295.0571.100 **Sales of Custom Tables.** An interior decorator had custom tables fabricated for a client and also had an artist paint a faux finish on the tables.

Although the client paid the table fabricator directly, the client contracted with the interior decorator for the purchase of the tables. The interior decorator is the seller and has made a retail sale of the tables and must pay tax on the sale. If the agreement or billing separately state the charge for the tables and that charge is the ''retail'' price, i.e., the cost of the table including artist's fees plus a reasonable markup, that retail price is the measure of tax. If the retail price is not separately stated, the measure of tax is the entire billing unless it can be established that a portion of the fee is for exempt professional decorating services. 1/20/92.

295.0571.900 **Sales of Photographs to School Children.** There is no exemption from tax for the sale of school and sports photographs to school children. Tax applies to such sales. 2/4/94.

GROSS RECEIPTS (Contd.)

295.0572 **Sales By Publicly Supported Television Stations.** The measure of tax on the sale of tangible personal property by a publicly supported television station is the sales price of the property to the television station when the following conditions are met:

(1) A viewer makes a contribution to a nonprofit, publicly supported television station and receives tangible personal property upon making the contribution.

(2) The primary purpose of the contribution is to make a donation to support the television station.

(3) There is a significant disparity between the amount of the contribution and the retail value of the property received in connection with the contribution.

If the television station has paid sales tax reimbursement or use tax on its purchase of the property, no further tax is due. 4/23/93.

295.0575 **Sale of Royalty Rights.** A taxpayer sold medical equipment for a stated amount plus a royalty based on the number of patients using the equipment during a 60 month period. The taxpayer reported sales tax on the sales price of the equipment and also on the royalties as they became due and payable. Subsequently, the taxpayer sold the rights to a substantial portion of the future royalties to a finance company.

The sale of the future rights to the royalties is a sale of an intangible asset and no sales tax applies to the amounts received on the sale. However, the taxpayer, not the finance company, would continue to owe sales tax on the royalty payments it receives as the amount becomes definite. 5/17/88.

295.0580. **Overtime Payments Charged to Vendee.** A seller of construction materials makes an additional charge for overtime payments paid to its employees because the purchaser requests a later delivery time than was originally scheduled. The tax applies to the total of the original sales price of the materials and the separately billed amount for the overtime payments. 9/22/66.

295.0600 **Partial Reimbursement.** The total receipts from the sale of equipment located in a business area condemned for urban renewal are subject to the tax even though the equipment was sold for less than its predetermined value when the urban renewal authorities reimbursed the taxpayer for the balance. 5/16/68.

295.0620 **Patent License.** The amount received for a patent license, sold with machinery and necessary to operate the purchased machinery, must be included in the measure of the tax. The right to use tangible personal property is part of the rights inherent in the general concept of property. Thus, the amount received for the patent license is attributable to the sale of the machinery and, as such, is taxable. 11/3/66.

295.0622 **Satellite Television Service.** A firm provides direct to home satellite services to end users. The customer receives the service through a satellite dish antenna, a set top receiver/decoder and a remote control which are purchased from retailers. Included with the set top receiver/decoder is an ‘‘access card’’

encoded with information to descramble the programming which is purchased. The signal for the programming will be sent by satellite.

The firm does not own or lease the satellite dish antenna, receiver/decoder or remote control. The equipment is the property of the consumer.

The firm's charges to its customers for the customers receiving the satellite signals which the firm transmits are not subject to tax. The firm's transmission of the signals to the customers does not result in the sale or purchase of tangible personal property. 7/7/94.

295.0625 **Photo Canvassing.** A photographic firm obtains orders for home portraits through canvassers. The photographs are taken by the firm's photographer. The proofs are returned to the canvassers who take them to the customers and attempt to obtain additional orders. When the canvassers obtain additional orders for prints, a down payment is made and the customers receive an invoice showing the total sales price, down payment and amount due. The prints are made up and mailed C.O.D. to the customers. Sometimes the customers refuse to accept the prints which are returned to the firm. In such cases, the firm does not return the down payment.

Under the circumstances, since the photographs have been made to the special order of the customers and the down payment was made, the sales were consummated. Therefore, the invoiced amounts are taxable gross receipts but the firm is entitled to a deduction for bad debts with respect to the unpaid balances. 11/10/65.

295.0640 **Sale of Computer with Proprietary Software.** The value allocated to computer programs contained in a personal computer which is sold is includable in the measure of tax. 7/16/93.

295.0646 **Sales of Gasoline and Car Washes.** The following explains the application of tax to situations involving the sales of gasoline and car washes.

(1) A customer is given a ''free'' car wash provided a stipulated amount of gasoline is purchased.

The free car wash is considered a service that is part of the sale of gasoline. The gross receipts from the sale of gasoline should not be reduced. The car wash is seen as analogous to the washing of the windshields or pumping air into tires.

(2) A customer is given a reduced charge for the car wash based on the number of gallons of gasoline purchased.

The reduced charge should be treated as a nontaxable charge for an optional service, similar to the Board's policy on optional warranty charges.

(3) A customer is given a reduced price for the gasoline provided a car wash is purchased for a fixed price. The car wash price is the same whether or not the customer purchased gasoline.

Since the reduced charge of the gasoline is above cost and is posted on the pumps, the reduced price should be accepted as the selling price of the gasoline. To include the car wash price, or part of it, as receipts from gasoline sales would

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be to dictate the selling price to the dealer for sales tax purposes. The dealer should be free to stimulate car wash sales by reducing the price of the gasoline. 5/30/73.

295.0647 **Sale of Low Vision Aids and Training Packages.** A taxpayer dispenses low vision aids and provides training and rehabilitation services. The aid is a prosthetic device that enhances the vision of the legally blind. Each time a device is sold, the taxpayer also sells a training package on how to use the device. This training package is sold as a separate item and at an additional cost to the patient. The training is performed by both licensed and nonlicensed health care providers such as opticians, optometrists, clinical assistants, and occupational therapists.

If the customer must purchase the training package as a condition to the purchase and/or functional use of the device, then the training package is mandatory and a service that is part of the sale of tangible personal property. If so, the taxable gross receipts for the sale of the device would include the charge for the training package.

If the purchaser may purchase the device without also purchasing the training package, then the training is optional. If so, the application of the tax to the charges for the training depends on whether the training itself is a sale for tangible personal property, in whole or in part. If the training consists only of the providing of training material, the entire charge is taxable. If, however, the taxpayer performs significant training services and bills lump sum, then no tax applies to that lump-sum charge for training. The taxpayer would be the consumer of the classroom material it provides and tax would apply to the sale of these materials to the taxpayer. If, instead, the taxpayer makes a separate charge for the materials it provides to its customers as part of the training (such as video tapes, pamphlets and books), it would be the retailer of any such material and sales tax would apply to that separate charge. 10/18/96.

295.0648 **Sale of Microbes.** The gross receipts from the retail sale in this state of microbes that consume toxic hydrocarbon chains are taxable. The microbes are not a form of animal life which ordinarily constitute food for human consumption nor do they constitute feed for such forms of animal life. In addition, California does not have an exemption for products that aid in pollution control. 8/16/91.

295.0650 **Sales of Trailers.** A trucking company, engaged solely in the transportation of U.S. Mail, purchases forty trailers. The company has three contracts requiring the transportation of U.S. Mail from Los Angeles to Oakland and San Francisco. The trailors are built out-of-state and delivered in California. The trailers will be used from the Los Angeles and Oakland post offices.

Since the trailers are sold by a dealer in California, sales tax applies to the sale of these trailers. There is no exemption from the sales tax based on the use of these trailers for delivery of interstate mail under contracts with the U.S. Postal Service. 1/27/92.

295.0660 **Selling Price Below Cost, Further Explanation of Applicable Rules.** Manufacturers frequently purchase advertising material and sell it to their dealers at less than cost.

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If the manufacturer gives away the advertising material, then, provided the gift takes place in the state, he is liable for use tax upon the purchase price of that material. If he makes but a nominal charge to his dealers for it, he is the consumer of it rather than the reseller thereof. Where there is in fact a substantial sales price then under the definition in the statute the property was purchased for resale and the tax applies only to the retail price.

If a fictitious retail price were charged solely to avoid tax, that price would be ignored as a sham. If, on the other hand, the transaction is bona fide, the tax is measured by the actual gross receipts from the retail sale of the tangible personal property. 5/21/51.

295.0680 **Selling Price Below Cost.** Even though advertising material is sold for less than its cost the difference between the cost and the selling price does not represent a taxable figure, unless the sole reason for selling below cost is to avoid or minimize the tax, with the true selling price being in some manner concealed or paid through some indirect method. This assumes, of course, that the transaction is a bona fide business transaction not designed to set up a fictitious sales price. 4/9/51.

295.0700 **Selling Price, Far Below Cost.** ''X'' is the consumer of the safety glasses which it purchases from a dispensing optician and furnishes to its employees to whom a charge is made of 15 percent of the cost of the glasses to ''X''. 6/5/51.

295.0701 **Services That Are Part of The Sale.** A retailer sells instructional materials to instructors. It also sells a ''developer's pack'' which includes the right to modify the materials for development of customized seminars. The gross receipts subject to tax include any amount charged for the right to teach or customize the materials. 11/28/90.

295.0702 **Services Related to the Sale of Printed Matter.** When a firm sells printed matter, separately stated charges for word processing, folding and stapling of printed matter are services related to the sale of the printed matter.

A separately stated charge for composing a resume is not taxable when the purchaser of the printing is not required to contract with the printer for the composition service. 6/24/94.

295.0702.500 **Singing Telegram.** A taxpayer sells and delivers balloons and party decorations. If a customer so requests, a singing telegram may be included with the delivery. A service charge is made which is not labeled as to whether it is for delivery prior to title transfer, which would be taxable, or for the performance of the singing telegram, which would be a nontaxable service. It becomes the burden of the taxpayer to provide evidence that the charge was for the nontaxable service of performing the singing telegram. 10/28/93.

295.0703 **Software Licensing.** A company develops and publishes video games that are currently manufactured and distributed on floppy disks. The company may issue non-exclusive licensing agreements for their product to persons who could be granted the right to convert and modify the video games to be

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compatible with computer/interactive entertainment formats. The company would supply to the licensees object code masters for the licensed games and mechanical art or film for all components necessary to complete the licensed products. The licensee pays the company (licensor) royalties equal to a percentage of net sales for the sale and distribution of the licensed products.

Royalties paid for the right to reproduce or copy a program to which a federal copyright attaches are not subject to tax provided the purpose is to publish and distribute the program to third parties for consideration.

Charges for transfers of mechanical art and film in connection with such licensing agreements are subject to tax.

Charges for transferring the date from floppy disc to CD ROM are subject to tax.

Rentals of video games to consumers are subject to tax pursuant to Section 6006(g)(7) and Section 6010(e)(7). 9/2/92.

295.0705 **Software Prototypes.** A computer consulting business also creates custom software. It is contemplating a contract to develop and install a system in a foreign country for a foreign entity. A prototype will be fabricated and assembled in this state to serve as a model or a ''test-bed'' for the larger system which will be assembled and developed in the foreign country. The prototype will be used to perform such tasks as hardware and software integration and system problem correction. On completion of the contract, the prototype will be shipped to the customer. Title to the prototype will transfer to the customer upon delivery to the common carrier for shipment.

The prototype is clearly ''tangible personal property'' as defined in Section 6016. The use of the prototype in this state to integrate hardware and software and to correct system problems is other than for demonstration and display for the purpose of resale. The sale to the computer consulting business of the materials and labor to fabricate or assemble the prototype is a taxable retail sale. The sale to the customer is a second retail sale, but that sale will be exempt from tax if meeting the requirements of subdivision (a)(3) of Regulation 1620. 5/3/93.

295.0710 **Standby Charges.** A ''standby'' charge made for standing by with a loaded vehicle after the goods have reached their destination is part of the charge for transportation. It is not includable in the taxable gross receipts from the sale of the goods under a contract calling for delivery at destination if made for standing by at the destination after having allowed the buyer a reasonable opportunity to take possession. Under those circumstances a tender has been made and the sale has occurred before the charge for standing by is incurred. In the absence of evidence to the contrary, it will be presumed that charges designated as ''standby'' charges are in this class. 11/26/74.

295.0711 **Start-Up Cost—Sale of Equipment.** A taxpayer designs and manufactures equipment used in the treatment of wastewater for municipalities and other industrial applications. The taxpayer sells the equipment to the customer but is not involved in the installation of the equipment at the job site. It does, however, have a subcontractor that goes to the jobsite when the equipment

is ready to begin operation and assists in the ''start-up'' of the equipment. The equipment is shipped to the jobsite via common carrier. The equipment is bid and invoiced as a lump-sum price. There are no separate line items on the invoice for start-up cost, freight cost, or materials.

Since the taxpayer requires the purchaser of the equipment to purchase the start-up services as a condition of purchase and/or for the functional use of the equipment, then that start-up service is a service that is part of a sale and the charge for it is subject to tax. No deduction from the taxable gross receipts is allowed on any freight costs to taxpayer since charges for transportation from the taxpayer's place of business or other point from which shipment is made directly to the purchaser are not separately stated on the invoice to the customer. 10/17/96.

295.0713 **Storage Charges.** All services performed prior to the delivery and passage of title to the property sold is includable in gross receipts. Therefore, storage charges are subject to tax. 3/15/91.

295.0720 **Suit Clubs.** A merchant organizes a suit club for a fraternal organization whose members will pay a specified amount each week for fifty weeks, at which time the merchant will provide the member a suit. In addition, each week the name of a member is drawn. The winner obtains a suit and may at that time cease his weekly payments. Alternatively, the member can continue to make his weekly payments and he will receive a second suit. The fraternal organization receives a percentage of the receipts and the balance is paid to the merchant.

The merchant is making taxable retail sales of all suits, including those furnished to the weekly winner. A seller may not deduct from the measure of sales tax the costs of salesmen's commissions. Here, however, the merchant is not paying the fraternal organization a commission. Rather, its members are making a contribution to their organization as part of the suit club. Only the amounts actually paid to the merchant are subject to tax. 4/18/52.

295.0721 **Telephone Conferencing Equipment.** A firm has conferencing equipment located outside of California. Some courts in California require lawyers to appear telephonically. As a result, the firm has installed equipment for use by the judge in California in order that the judge may better hear and communicate with all participants without holding a phone receiver. Assuming there is no charge to the courts for the equipment installed in courtrooms, there is no taxable sale by the firm. However, it appears that the firm has use tax liability with respect to such equipment. There is no fee to the court. Rather, the only fee is charged to the lawyers. The charge to the lawyers is not taxable since there is no sale of tangible personal property. 5/16/97.

295.0722 **Telephone Inquiry and Telecommunications Services.** As part of a taxpayer's subscription price for a taxable publication, a subscriber is provided with a toll-free telephone number with which the customer can obtain more specific information about carrier services covered in the publication. This toll-free number is operated by a third party. In addition, the taxpayer and the third party provide a different telecommunication service which is sold

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independent of subscription to the publication. A subscriber to the service could, by telephone, acquire access information regarding U.S. postal rates as well as overnight courier services, rates, etc.

Since the telephone service is provided as a part of the taxable sales of the publication and the subscriber does not have the option to acquire the publication without the telephone service, tax applies to charges allocable to the telephone service included in the subscription price. However, since the telecommunications service may be purchased without subscribing to the publication, sales of the service are not subject to tax. 9/14/87.

295.0725 **Television Filming Sets.** A taxpayer is engaged in designing, constructing and selling or renting scenery used in filming television commercials. The taxpayer assembles the sets at its own facilities so that approval can be obtained from its customers prior to filming. After approval, the set is disassembled, transported to the studio and reassembled. Separate charges are made for setup, stand by during filming, disassembly, transportation, and art direction.

If the standby and disassembly are optional, the charges are not subject to tax. If the reassembly is optional, and title or possession are passed to the customer prior to reassembly, tax does not apply to the charges.

Art direction involves a person who ensures the set looks good on film and decides what props are needed. This person also is responsible for watching the monitor during filming and making changes that may be needed. The portion of the charge that relates to the designing and construction of the sets is a service that is part of the sale and subject to tax. The portion related to work done during the filming is a service related to the filming and is nontaxable, if such charges are optional. 10/7/94.

295.0728 **Tooling Evaluation.** A manufacturer manufactures molds which it uses to produce wheels for automobiles. The molds are sold prior to production of the wheels. The molds are evaluated before and during production. The question is whether the charges for these evaluations are services that are a part of the sale of the mold, which is subject to tax, or related to the wheels which are sold for resale.

In this instance, these charges for evaluation are services that are part of the sale of the wheels and therefore are sales for resale. The conclusion is based on the following: the engineering specifications which have been submitted outline a comprehensive wheel testing program from pre-production through production. The goal is repeatedly described as providing an evaluation of ‘‘design intent’’ of the wheel. If any requirements of the tests are not met, the result could be changes in tool design, or changes in material composition, or changes in manufacturing process. Thus, the mold is incidentally being tested along with the manufacturing process and the material composition, but the ultimate goal of the testing is to validate the wheel. This conclusion is supported by the fact that the wheel validation test are not performed for all customers who purchase wheels even

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though the tooling for each is the same. This fact indicates that the validation tests are not required for the tooling itself. 8/5/93.

295.0730 **Training Customer's Staff.** As a part of the ''installation charge,'' taxpayer spends two-thirds of the time charged for ''installation'' on training the staff of the customer in operating and maintaining the new machinery.

Charges for such training which are separately identifiable and optional to the customer may be excluded from the measure of tax. On the other hand, if the training is practically or contractually mandatory, then the charges applicable to the training may not be excluded from the gross receipts of the machinery. 10/4/76.

295.0737 **Transfer of Peptides-Collaboration Agreement.** Taxpayer, a biotechnology company engaged in the research and development of peptides, entered into a collaboration agreement with another biotechnology company to develop new marketable products. Under the terms of the agreement, the taxpayer receives the right to use the company's existing products in taxpayer's research and development process. The company's technology is transferred to the taxpayer in tangible form (i.e., peptide libraries in vials) along with a written synopsis of each peptide's chemical structure. The company retains the ownership rights to the peptides and the taxpayer's use is restricted solely to research and development activities. Due to the physical characteristics of the technology, the peptides are destroyed during the taxpayer's activities.

For each peptide library provided for screening, the taxpayer pays the company a fixed amount for each library delivered. If the taxpayer's research efforts result in a ''marketable'' product, the collaboration agreement requires milestone payments and royalties. The nature of the product governs which party must pay the milestone and royalty amounts. If it is a therapeutic product, the taxpayer must pay the company; however, if a diagnostic product is developed, the company must pay the taxpayer.

In this case, the company is receiving consideration in the form of cash based on the transfer of peptide libraries. The transfer is not a lease since the libraries are destroyed in the course of the taxpayer's research and are not returned to the company. The fact that the agreement characterizes the transfer of the libraries as a ''license'' does not alter the treatment of the transfer under the Sales and Use Tax Law since possession of the libraries is not returned to the company. The remaining issue is what are the gross receipts from the company's sale of the libraries to the taxpayer.

Under the agreement, the taxpayer pays the company amounts for the libraries furnished to the taxpayer for screening. However, the taxpayer does not always make royalty payments to the company. Rather, where a ''marketable'' product is identified, the company may pay the taxpayer milestone and royalty fees, or the taxpayer may pay the company milestone and royalty fees, depending on whether the marketable product is therapeutic or diagnostic. Under the specific facts of this contract, the milestone and royalty payments are not regarded as to be from

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the company's sale of its peptide libraries. Thus, tax applies only to the company's charges for the sale of its peptide libraries. 5/10/95.

295.0740 **"Undercoating."** Taxable gross receipts from sale of automobile includes charge for undercoating prior to sale even though charge is separately stated. Persons undercoating used cars for owners are consumers of materials used. 5/15/50.

295.0743 **Unlock Code Fee.** A taxpayer sells CD-ROM disks which embody software programs. The purchaser of the disk has access only to certain programs on the disk, but may examine demonstrations of other software on the disk. The taxpayer has an ''800'' telephone number which the purchaser may call and pay a fee to obtain an unlock code for access to other programs on the disk.

The transfer of the disk is considered a sale of tangible personal property. The payment of a fee to obtain access to a portion of the disk is a further payment for use of the disk. Tax applies to the charge for the unlock code. 5/2/95.

295.0747 **Use Tax is Due on Agreed Sales Price.** An individual sold a vessel to a purchaser, as agent for a corporation, for an agreed sales price of $60,000. The purchaser seeks to reduce the agreed sales price as the measure of tax on the basis of allegations of fraud set forth in current litigation with the seller.

Once a sales price is agreed upon and a transaction completed based thereon, a dispute thereafter between seller and purchaser as to the price does not have any bearing on the use of the agreed price in computing the use tax, *Southern California Edison Co.* v. *State Board of Equalization* 7C 3d 652 (1972). The court stated, ''An overall view of the sales and use tax statutory scheme, however, indicates that the Legislature intended the sales price and gross receipts terminology of sections 6011 and 6012 to refer to the **price agreed upon at the initial sales transaction** and not to the net amount which the buyer ultimately pays for the goods purchased.'' (emphasis is that of the court). Even if subsequently there is a settlement or adjudication concerning the vessel, it would not have the effect of reducing the initial agreed sales price on which the tax was predicated. 9/8/75.

295.0750 **Video of Wedding.** A chapel, performing private ceremonies, sells video tapes of the wedding ceremonies. Although a ''sale'', for purposes of the Sales and Use Tax Law, does not include any transfer of a ''qualified motion picture'' under certain circumstances, the term ''qualified motion picture,'' does not include motion pictures produced for private noncommercial use, per Section 6010.6(b)(3).

Accordingly, the sale of a video tape of a wedding, which is for private noncommercial use is subject to sales tax. 8/11/93.

295.0752 **Videotape.** A person created a visual impact study concerning a proposed construction site. The final product transferred to the client consisted of still photographs and a videotape which the client will use for various presentations concerning the project.

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The gross receipts from the sale of photographs and artwork are subject to sales tax. The videotape that was prepared is a ''qualified motion picture''. The portion of the charge that represents the charge for the qualified motion picture is not subject to sales tax. 11/17/91.

295.0753 **Video Tape Duplication.** Charges for making video tape duplications of the master tape for distribution are subject to tax. 5/29/97.

295.0754 **Wedding Functions.** A wedding consultant/planner makes all of the arrangements necessary for a wedding. The consultant's charges and the corresponding tax application are set forth below:

(a) Wedding cakes. Charges by a caterer for the issuing of food provided by others are subject to tax under Regulation 1603(h). Therefore, charges for providing the wedding cake and the charges for the cutting and serving of cake are subject to tax.

(b) Accommodations. When the accommodation charges relate to sales to tangible personal property, they are subject to tax. Thus, charges for accommodation of staff who will serve meals must be included in the measure of tax for sales of those meals.

(c) Musicians/entertainers. Assuming these performers are not used in connection with the sale of any tangible personal property nor are they used in connection with the service of food, amounts paid for these performers are not subject to tax.

(d) Set-up/tear-down labor. If these amounts are connected to the sale of the tangible personal property or the service of the meals, charges for set-up and tear-down are included in the measure of tax. 3/22/94.

295.0755 **Wine Tasting and Seminars.** A retailer of wine presents a series of educational wine tastings and seminars. The retailer charges the participants a fee for the seminar. After a lecture, the retailer provides wines to the participants to taste. The retailer purchases the wines under resale certificates. Tax is due on a percentage of the total price charged for the seminar based on the value of the wines tasted in each seminar. 12/6/79.

295.0757 **Canceled Contract.** A taxpayer designs and manufactures property to the special order of its customers. If a customer cancels the contract prior to completion, a fee is charged to compensate the taxpayer for the work performed. If no tangible personal property is transferred and there is no fabrication of customer furnished property, there is no sale, and the fee is not part of taxable gross receipts. 8/16/90.

295.0758 **Shortage in Delivery.** A retailer contracted to sell a set amount of fuel for a certain price, and although less fuel was delivered, the full price was charged to the airline. The effect of this was to increase the selling price of the fuel which was actually delivered. Therefore, tax applies to the full selling price charged. 2/21/85.

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(b) ASSUMPTION OR CANCELLATION OF INDEBTEDNESS

295.0760 **Balance on Conditional Sales Contract.** When a person who is a ''seller'' and who is purchasing equipment under a conditional sale contract exchanges the equipment for an interest in a house, sales tax applies to the receipts from the sale and the receipts consist of the value of the interest in the house plus the assumption by the buyer of the balance owing on the conditional sales contract. 5/7/54.

295.0765 **Cancellation of Contract Prior to Deliveries.** A taxpayer contracts to fabricate and sell tangible personal property to a customer. At the completion of the fabrication it is found that the property is not usable for the purpose for which it was intended. The contract is canceled, but the customer reimburses the taxpayer for labor costs incurred in the fabrication. Since no tangible property was transferred, there was no sale and there is no tax unless the contract provided for transfer of title to the customer prior to delivery. The taxpayer is regarded as the consumer of all property used on the contract. 12/29/93.

295.0770 **Formal Title Transfer.** A husband and wife transferred realty in exchange for a trust deed and a motor home. The equity in the motor home was applied to the purchase price of the realty and the couple agreed to assume the loan on the motor home. After the close of escrow on the transaction, the couple failed to re-register the motor home in their own names or to formally assume the loan balance, although they did make loan payments as scheduled. The registered owner of the motor home attempted to persuade the couple to re-register the vehicle and to formally assume the loan, but they refused to take either action. Finally, to settle the dispute, the couple returned the vehicle to the registered owner and agreed to waive reimbursement for the loan payments which they had made. The registered owner also agreed to be responsible for the loan.

The transaction is viewed as a sale despite the absence of a formal change of title. The amount subject to tax is the sum of the loan assumed plus the equity allowed as part of the purchase price of the realty. A formal assumption of the loan is not necessary to establish an assumption of the debt. The acknowledgment of the debt by the purchaser through the payments and notation on the checks is sufficient in this circumstance. The return of the vehicle to the registered owner is regarded as a rescission which is not subject to tax. 4/20/94.

295.0775 **Membership Fees.** A taxpayer operates a discount membership store which offers two types of memberships, business ($25 per year) and individual ($30 per year). Each member pays the posted price for each product with no discount or surcharge. Nonmembers can not make purchases. The taxpayer is beginning a ''90-day free pass'' promotional program to obtain more members. Many selected individuals are offered a ''90-day free pass'' which allows them 90 days to shop and purchase goods at a price which is five percent above the posted price. When those individuals come to the store, they are given a choice of immediately becoming a member (which some do), or obtaining the free pass. Once the 90 days expires, the pass holder has the choice of becoming a regular member or being excluded from the store. The promotional program only covers a specific time period.

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During the period of time this 90-day free pass program is being offered at the stores, the portion of the taxpayer's total membership fees related to taxable sales is subject to sales tax as it is considered derived from the retail sale of tangible personal property. Membership fees are part of taxable gross receipts when a person who pays a fee is entitled to purchase merchandise for a lower price than a person who does not pay a fee. (Regulation 1584). 6/6/94.

295.0780 **Notes, Indebtedness on.** Where a taxpayer transfers personal property to another and the transferee assumes the indebtedness on such property and also cancels taxpayer's indebtedness to him on certain notes, both the assumption of indebtedness and the cancellation of taxpayer's notes constitute "gross receipts" and the measure of the tax on the transaction. 12/30/54.

295.0800 **Insolvent Debtor.** Where property of an insolvent debtor is sold by an assignee or receiver and the purchaser either assumes the existing balance on a conditional sales contract, or purchases it "subject to" such unpaid balance, the balance due is a part of the consideration for the sale of the property and is subject to sales tax. 6/22/55.

295.0820 **Liabilities.** In a sale of a business whereby the purchaser assumes outstanding obligations of the seller, such obligations constitute a part of the taxable gross receipts. In such a transaction no set off of unpaid open accounts is allowable. 11/24/53.

(c) DISCOUNTS
Trading stamps as, see also Trading Stamps and Related Promotional Plans.

295.0860 **Bank Credit Plans.** Retailer honoring a bank's credit cards may not deduct from gross receipts the 3% to 6% charge made by a bank for its service. The service charge is not a cash discount because it is an amount allowed someone other than the purchaser. 5/15/59.

295.0880 **Billing and Collecting Charges.** The customer is the party who must receive the benefit of the discount in order for the retailer to exclude it from his gross receipts. Compensation paid by a restaurant to certain organizations for their services in billing and collecting from their members is not a cash discount. 1/31/58.

295.0888 **Cash Discounts.** A retailer offers cash discounts for prompt payment. If a customer makes prompt payment and takes the discount, the retailer's gross receipts are the amount billed less the discount. If a customer does not make prompt payment, the retailer's gross receipts are the amount billed. The statute excludes only discounts allowed and taken. 5/13/94.

295.0900 **Cash Prizes.** Punchcards were purchased by a grocery store, which distributed them to customers and nonpurchasing visitors. Cards could be redeemed by customers after making $100 of purchases, as indicated by punches on the cards or cards could be redeemed by nonpurchasing visitors by accumulating weekly "free" punches. Upon redemption each customer or visitor received a cash prize of $1 to $100, the amount designated under a seal on each

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card, which was opened by a store employee. The store was the consumer of the punchcards. The amounts of such cash prizes were not cash discounts, inasmuch as receipt of such amounts did not necessarily depend on the recipient having made any purchases and the amounts received bore no relation to the amount of purchases actually made by a customer recipient. 9/21/64.

295.0920 **Christmas Club Plan,** allowing discount on December purchases based on percentage of purchases throughout rest of year, treated as deductible trade discount. 11/14/50.

295.0925 **Club Membership Fee.** A clothing company sells a club membership to customers for $20. The membership fee entitles the customer to a 20% discount on all purchases.

The $20 membership fee is related to anticipated retail sales and; therefore, the amount is includable in the gross receipts of the clothing company's sales of tangible personal property (Revenue and Taxation Code 6012). 3/1/90.

295.0940.175 **Credits Given to Purchaser of Sample Merchandise.** A distributor of advertising specialties, i.e., pens, ashtrays, calendars, coffee mugs, etc., purchases sample merchandise from the suppliers of the merchandise. The sample merchandise is shown by the distributor to potential customers. The suppliers bill the distributor for the sample merchandise but the amounts billed are reduced by subsequent credits. If samples were not billed and if suppliers were to offer unlimited free samples and catalogs, there would be substantial and almost uncontrollable waste of resources. The basis for the credits from the suppliers are not uniform. Some of the bases from which the credit is determined are as follows:

(1) Based on prior year's purchases.

(2) A memo billing is sent with the samples. These are totaled at the end of the year and credited out in whole or in part in accordance with purchases made (other than samples) during the current year.

(3) Bill and collect for samples as they are shipped and a check or credit is issued at the beginning of the following year in accordance with established policies.

The above credit or rebate is not an adjustment of the sales price of the samples but rather is consideration applied to pay for them. Section 6011 expressly provides that the ''sales price'' includes any ''amount for which credit is given to the purchaser by the seller.'' The rebate is a credit given to the distributor, purchaser, by the suppliers, sellers, in consideration of its making a certain volume of purchases of resale merchandise. While the credit may, by reason of the agreement, be limited to the value of the samples, this does not preclude its classification as consideration received for making the volume purchases. Absent a specific volume of purchases, the credit would not have accrued and the price of the samples would necessarily have been required to be satisfied from other sources. 10/28/85.

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295.0941 **Discount Coupons.** A taxpayer, who is in the restaurant business, sells coupon booklets for $1.00 each which contain multiple discount coupons entitling the purchaser to various discounts on meals sold by the taxpayer.

The sales of the coupon books by the taxpayer are regarded as sales of nontaxable rights to discounts on its meals. The actual coupons are a record of the rights to receive the discounts and do not constitute a sale of tangible personal property at the time the coupon books are sold. However, when a coupon is presented by a customer, it is regarded like that of a manufacturer's coupon since the taxpayer will have received compensation from the customer via the amount previously paid by that customer for the coupon. This means that the taxpayer's gross receipts from the sale of a meal to customers presenting a coupon will consist of any amounts received from the customer for the meal plus an amount representing a prorata share of the $1.00 coupon allocated to the coupon used by that customer. This prorata share equals the $1.00 coupon booklet allocated to the coupon booklet divided by the number of coupons in that booklet that the retailer, in good faith, believes a customer might redeem toward the purchase of meals. Thus, if a coupon booklet contains ten coupons, an additional $.10 should be allocated to the gross receipts from the taxpayer's sale of taxable food products to a customer presenting a discount coupon. Tax does not apply on the prorata share allocated to coupons that are not redeemed for discounted meals since the taxpayer is not regarded as having received additional compensation from the customer as part of the sale of taxable food products as a discount rate. 3/13/96.

295.0942 **Discounts Based on Prior Purchases.** A taxpayer gives price discounts to customers based upon the amount of prior purchases. The discounts are regarded as trade discounts and are not included in the amount subject to tax. 12/3/93.

295.0944 **Employee Discounts.** Employees of a corporation that operates a retail store receive a 25 percent discount in the store at the time of sale. The employees then mail the sales receipts to corporate headquarters for an additional discount which represents the difference between the amount paid and the corporation's cost of the merchandise plus a small mark-up. The additional discount is sent to the employees in the form of a check. The amount of the discount is not a rebate or amount based on sales by the employee to third parties. Rather, it is a discount in the sales price of specific property given by the seller to the purchasing employee. The additional discount is not part of taxable gross receipts. If tax reimbursement has been charged on the additional discount, it constitutes excess tax reimbursement. 9/25/95.

295.0945 **Exchange of Foreign Currency to U.S. Dollars.** A taxpayer lost money due to the devaluation of the Mexican currency. To determine the proper amount of gross receipts, the foreign currency has to be converted, by rate of

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exchange, to U.S. Dollars. In regard to normal over the counter sales, the rate of exchange at the time of sale is controlling. For sales and use tax purposes, the gross receipts must be measured by U.S. Dollars. When foreign currency is accepted, it must be presumed that the currency was accepted at the rate of exchange in effect at the time of the sale. 3/8/77.

295.0946 **Financing Transaction.** Company A entered into an agreement with Company B to purchase a mainframe computer for a cash price of $4,895,800. The agreement indicated a $100,000 reduction in the cash price (labeled ''credit'') on the first installment payment if A used B's financing plan. The installment payment agreement shows a finance charge of $238,432.64 computed on the $4,895,800 cash price at an annual percentage rate of 10.52%. Company A requested an opinion regarding the sales tax consequences.

The $100,000 is not the type of credit referred to in section 6012 as part of the taxable measure since A would not receive additional consideration of $100,000 from B over and above the sales price for the computer. Instead, A would deduct the amount due on the first installment payment by $100,000.

However, not all of the $100,000 would constitute a nontaxable discount allowance. A portion of the $100,000 must be allocated to a reduction in the finance charges. The allocation is the difference between the finance charge on the $4,895,800 and the amount of finance charges computed based on the stated interest rate of 10.52% computed on the discounted price. 9/27/89.

295.0948 **Manufacturer's Rebate vs. Dealer's Incentive Or Allowance.** The manufacturer's rebate is an inducement to the consumer to purchase and is a credit available to be taken as cash or to be applied against the selling price of the vehicle. The consumer may assign the credit to the dealer. Under section 6012, the measure of the sales tax includes any amount for which credit is allowed by the dealer. The dealer collects the amount of the rebate from the manufacturer pursuant to the assignment made to the dealer by the consumer. The consumer rebate may be identified as an additional down payment or may be subtracted directly from the cash price of the vehicle. In both cases, the amount of the rebate is fully subject to tax.

As distinguished from a consumer's rebate, the manufacturer may make incentives or allowances directly to the dealers. These are inducements to the dealer to sell and are payable in the form of discounts on the cost of the vehicle to the dealer. The allowance may be a year-end close-out allowance based on unsold units. The assistance may take the form of incentive price assistance to enable the dealer to bid against competitors. The manufacturer may offer government price concessions or fleet incentives. In all of these cases the incentive or allowance is an inducement to the dealer and results in a reduction of the cost of the vehicle to the dealer. That is, there is a price adjustment between the manufacturer and a dealer as to the wholesale price of the vehicle. The actual amount of factory incentives or allowances or holdbacks may not be disclosed to consumers. In some cases, such incentives or allowances may be passed on dollar-for-dollar to the consumer and may be disclosed to the consumer whether

there is intentional disclosure or not. The incentive results in a reduction in the taxable retail selling price of the vehicle, and the measure of sales tax is thus reduced. 2/24/89.

295.0950 **Merchandise Redeemed With Frequent Buyer Dollars.** A customer can earn credits called ''frequent buyer dollars'' by buying a manufacturer's product from retailers. The earned credit can be applied towards the purchase of certain slow moving merchandise produced by the manufacturer. The designated merchandise is sold to the retailer at a much reduced price. The retailer sells the item to the customer for a specific cash price if the customer redeems a certain number of frequent buyer dollars.

Upon redemption, the frequent buyer dollars are considered to be a trade discount and should not be included in the measure of tax. 12/11/91.

295.0960 **Patronage Dividends Given by Retailer Cooperative.** A retailing cooperative, formed as a non-profit corporation under the California Corporations Code, gives rebates to its members semiannually, based on the total amount of their purchase from the cooperative. The rebates, made pursuant to Section 12805 of the Corporations Code, are patronage dividends, not cash discounts, and are not deductible from the taxable gross receipts of the cooperative. 10/15/65.

295.0965 **Price Adjustments.** An ''Enterprise Agreement'' provides for price reductions or credits for meeting and/or exceeding a dollar amount of purchases for a specific period of time. However, failure to meet the incentives will result in an upward adjustment.

There appears to be essentially three possible outcomes: (1) Company A achieves the revenue commitment and applies the amount (described as a credit) as a volume discount to reduce the purchase price on future purchases; (2) Company A again achieves the volume commitment but takes the amount as a credit to reduce outstanding accounts receivable, accumulated pursuant to purchases made under the contract; and (3) Company A fails to meet revenue commitments and owes Company B the difference between the actual revenue attainment and the agreed upon revenue commitment.

An amount deducted from the initial computation to reach the agreed price is not part of the taxable measure because there was never an obligation to pay that amount. Company A may use its volume discount to reduce the purchase price of future purchases from Company B. The amount of the reduction that was based on taxable purchases of tangible personal property is not included in the measure of tax. Price adjustments may be excluded from taxable gross receipts if they are part of a single integrated agreement that contemplates price adjustments. The price adjustment can be taken if the customer is actually given a refund in cash or discount in an amount equal to the agreed upon adjustment.

Assuming Company A's volume discounts are part of a single integrated agreement, the amounts taken to reduce outstanding accounts receivable accumulated from purchases made under the contract are not included in the measure of tax to the extent that the amount of the reduction was acquired from

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taxable purchases of tangible personal property. However, any upward adjustment charges paid by Company A to Company B must be used in the calculation of the measure of tax. When Company A pays Company B such adjustment charges, these payments increase Company B's gross receipts and must be included in the measure of tax. 10/4/93.

295.0975 **Real Estate Listing Fees.** Listing fees charged to an association of realtors by a publisher of a real estate listing publication are included in the gross receipts of the publisher from the sale of the publication to the association. Even though these fees are used to reduce the cost of the publication and, therefore, reduces its sales price, the fees are included in gross receipts pursuant to section 6012(b)(3), which provides that gross receipts include any amount for which credit is given to the purchaser by the seller. These fees are exempt from tax if the publication qualifies as a periodical under section 6362.7. 10/11/83.

(Note subsequent statutory change relative to periodical exemption)

295.0980 **Rebate Not a Cash Discount.** A retailer may not exclude from gross receipts an amount paid to a school as a rebate on purchases made by its students. A cash discount is excludible from gross receipts only when given to the purchaser. 4/15/58.

295.1000 **Rebates.** A refund to nonprofit groups based on a percentage of purchases made by the groups' members may not be treated as a cash discount. Such a refund must be considered as an expense of doing business rather than a reduction of gross receipts. The sales tax must be based on the total amount charged to the purchaser. 11/20/64.

295.1005 **Register Receipt Program.** A university book store conducted a ''Spring Bonus Program'' in which specially colored register receipts were given for each sale during the term of the program. At the conclusion of the program, refunds at a predetermined rate were given based on the total sales value, including sales tax reimbursement, represented by tapes turned in by the patrons. The refunds given were classified as cash discounts rather than patronage dividends because the offer was available to all customers, not just students. In addition, the advertised terms of the program resulted in a ''discount certain,'' not a discount based on chance or favored status. 12/31/79.

295.1012 **Software Licenses.** When the taxpayer allows customers who lease canned software a 50% credit of the lease payments toward the purchase price of the product, the measure of tax is the actual sales price of the property. In this case, the sales price is the amount after the 50% credit for the previously paid lease payments is subtracted from the purchase price of the software. 6/2/89.

(d) CONSIDERATION OTHER THAN MONEY

295.1040 **Contest Points.** If employee contest points are redeemable in merchandise, transfers of merchandise to employees constitute sales and are taxable. If an option exists under which points can alternatively be redeemed in cash, no sales tax applies if such option is exercised. 9/8/69.

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295.1045 **Coupons.** Amounts paid by a manufacturer to a retailer for redeeming coupons good for a free oil filter with the purchase of an oil change from the retailer are included in the retailer's gross receipts. The retailer may, by contract, charge the customer sales tax reimbursement on the amount paid by the factory. See also Annotation 295.0430. 3/11/93.

295.1050 **Equipment Exchange.** A firm manufacturers and sells fault tolerant large mainframe computer systems and fairly large minicomputer systems. The firm also helps its customers relocate their data centers. The firm is considering offering an option whereby the firm would place its reconditioned equipment at the new location. Once the system at the new location is functional and the application programs have been transferred, the customer's equipment at the old location would be removed and returned to the manufacturer. The equipment swapped would be unit-for-unit, of equivalent condition.

The transaction would result in the manufacturer making a retail sale of equipment to the customer with the manufacturer taking the customer's equipment as a trade-in. The gross receipts of the sale include the fair market value of the equipment traded in and any other consideration paid by the customer for the swap. Charges for labor for services used in installing the equipment sold would be excluded from the measure of tax. 2/18/93.

295.1070 **Gift Certificates Used as Prizes.** Where a golf club holds tournaments and the entry fee includes a charge for a meal at the club restaurant and the tournament prizes consist of gift certificates usable at the club pro shop, the normal retail price of the meal must be included in the taxable gross receipts of the restaurant since there is a sale of tangible personal property included in the entry fee. The gift certificates are considered to be the same as cash and when they are used at the pro shop, the retail selling price of the goods must be included in the taxable gross receipts of the pro shop. 5/26/76.

295.1073 **Hostess—Free Goods.** A retailer furnishes merchandise free of charge to hostesses who market the retailer's merchandise by holding hostess parties. The value of the ''free'' merchandise is based on the value of merchandise paid for and shipped as the result of the hostess' party. The definition of gross receipts under section 6012(a) includes ''the total amount of the sale . . . whether received in money or otherwise . . . '' Here, the retailer receives the sales price for the ''free merchandise'' not in money, but rather in services performed by the hostesses. The measure of tax is the value of these services performed in exchange for goods. Absent any express agreement to the contrary between the retailer and the hostess, the value of the services is equivalent to the retail value of the goods received. 12/11/90.

295.1080 **Merchandise Exchanged for Radio Time—Trade Agreements.** Where merchandise is sold to a California broadcasting station in exchange for radio time the stated value of the air time will be the measure of tax unless the agreement (either written contracts or invoices) also states the fair market value of the merchandise. 11/22/78.

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295.1100 **Real Property.** In the trading of a business for which a seller's permit is required for a home of approximately the same value, the sales tax applies to the selling price of the tangible personal property involved, which will be consumed rather than resold by the party acquiring the business, irrespective of the fact that the consideration received thereof is real estate. 7/17/53.

295.1120 **"Swap Shop."** The retailer's gross receipts from his exchange would be the fair market value of the property received by him. If the parties fix a value in the course of their bargaining, then such price will be deemed the sales price for sales tax purposes, except that any figure which was not arrived at in good faith but rather for the purpose of evading sales tax would not be acceptable. If the parties mention no cash value in the course of their bargaining, then the retailer must make the best estimate possible of the fair market value of the property received. 3/12/52.

(e) TAXES AND FEES (GOVERNMENTAL)

295.1140 **Bird Band Fees.** Manufacturers of bird bands are required by law to collect a fee from the purchaser on each band sold and to pay the fees collected to the Department of Public Health. The fee collected may be excluded from the measure of the gross receipts if it is separately stated on the invoices or other form of billing so that the fee is not collected as a part of the price of the band. 8/5/68.

295.1160 **California Pest Tax.** The California Pest Tax is imposed on the manufacturer. It is not excludable from the measure of sales and use tax. 6/6/94.

295.1180 **Cigarette Tax.** The sales tax, both state and local, applies to the entire sales price of cigarettes including the amount of the cigarette tax included therein; the cigarette tax is imposed upon the distributor of cigarettes and is part of the price of the consumer. 8/10/60.

295.1187 **City Tax Deduction.** A retailer is located in a city facility. As a condition of its lease with the city, it pays a city tax based on three percent of its gross receipts.

Such a tax is part of taxable gross receipts and is subject to the sales tax. The payment may not be deducted in computing tax liability. Only local taxes imposed by a city and a county pursuant to section 7200 et. seq. are excluded from gross receipts (section 6012(c)(6)), while all other locally imposed taxes are included. 12/13/95.

295.1200 **Crude Oil and Chemicals.** The tax imposed by Section 4611 of the Internal Revenue Code on crude oil received at a United States refinery and petroleum products entered into the United States for consumption, use, or warehousing is includable in the gross receipts of a retailer selling such products. Similarly, the tax imposed by Section 4661 of the Internal Revenue Code on listed chemicals is includable in the gross receipts of a retailer making retail sales of such products. 4/22/81.

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295.1230 **Customs Duty.** A construction contractor-retailer of fixtures is not allowed to deduct U.S. customs duty on imported fixtures from the measure of tax on such fixtures. Sections 6011 and 6012 exclude taxes imposed by the U.S. from the measure of tax, except for manufacturers' or importers' excise tax. An importer's excise tax includes and means customs and excise duties imposed on importation. Customs duty paid on fixtures may not be excluded from the selling price to measure the tax on a contractor's retail sale of fixtures under Regulation 1521. 2/11/70.

295.1240 **Erroneous Charges for Inapplicable City Sales Tax.** Erroneous charges for inapplicable city sales tax are taxable gross receipts in that such tax was not actually imposed by the city with respect to such sales. 10/15/51.

295.1241 **Federal Diesel Fuel Tax.** The 2.5 cents a gallon federal diesel fuel tax imposed by the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) is an excise tax and is included in the definition of "gross receipts." It is not one of the excise taxes to which refund allowances specified in the Internal Revenue Code may apply. Accordingly, the excise tax will always be included in the measure of tax of retail fuel sales on which the tax is imposed. 2/13/91.

295.1242 **Governmental Compliance Fee.** A nongovernment business makes a $3.00 charge as a governmental compliance fee. The fee is intended to recoup a portion of the fees that the business incurs in complying with any and all government regulations.

The cost of complying with government regulations is a cost of doing business. The $3.00 fee is a part of taxable gross receipts whether or not it is separately stated. 5/18/95.

295.1243 **Gun Dealer's Fee.** The fee imposed by the Department of Justice for processing Dealer's Record of Sale of Revolver or Pistol (DROS) forms in accordance with section 12076 of the Penal Code is imposed directly on firearms dealers. There is no statutory requirement that the dealers pass on the fee to the gun purchasers, however, a dealer may choose to pass on the fee to the purchaser. If the fee is passed on, it is includable in the firearms dealers' taxable gross receipts. 8/30/82. (Am. 99–2).

(Note: On and after January 1, 1999, the fee imposed by the Department of Justice is imposed directly on the purchaser and, thus, is not included in the measure of tax.)

295.1245 **Highway Revenue Act of 1982.** This Act, which is Title V of the Surface Transportation Assistance Act of 1982, amends or adds provisions to Title 26 United States Code (Internal Revenue Code of 1954) relating to fuel and other highway taxes. For sales and use tax purposes, the Act does not affect our present method of taxing sales of fuels or tires.

The Act does affect our method of taxing sales of trucks, tractors, and trailers. The old manufacturer's excise tax was properly included in the measure of the sales and use tax. However, under the Highway Revenue Act of 1982, the new 12

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percent and the transitional 2 percent tax (operative 4/1/83) are excluded from the measure of our sales and use tax as these are taxes imposed on the retail sale or purchase of the taxed vehicles. 3/11/83.

295.1248 **Inspection Fees.** The Federal Motor Carrier Safety Regulations require an annual inspection of trailers. The motor carrier cannot use the trailer unless the trailer has passed such an inspection at least once during the preceding twelve months and a copy of the inspection report is in the vehicle. A company offers the inspection to its customers in conjunction with the sale of trailers and states that this is an optional charge.

Assuming that the inspection occurs after the trailer is sold and that the contract documents and/or sales literature substantiates that this is truly an optional charge, the optional inspection is not a part of the sale. The inspection service charge should be excluded from the measure of gross receipts which are subject to sales and use tax. 5/9/91.

295.1252 **Luxury Tax.** Effective January 1, 1991, the United States has imposed a new retail excise tax, on the first retail sale of vehicles, boats, aircraft, jewelry and furs, to the extent that the price for such goods exceeds certain specified amounts. The rate of tax is 10 percent. The new tax is excludable from ''gross receipts'', under Revenue and Taxation Code Section 6012(c)(4)(A). The amount of any such tax is nontaxable under the Sales and Use Tax Law, whether imposed with respect to a sale involving a transfer of title or a lease transaction which is treated as a ''sale'' and ''purchase'' under Revenue and Taxation Code Sections 6006 and 6010. 12/6/90.

295.1255 **Luxury Tax—Nonqualifying Lease.** Where the lessor leases the vehicle under a nonqualifying lease, the first retail sale is the sale of the vehicle to the lessor and the federal luxury tax is imposed on that sale, not on the lease. A nonqualifying lease is a lease with a term of less than one year, such as a daily or other short term rental. Where the luxury tax is not imposed upon the transaction subject to sales or use tax, the luxury tax cannot be passed through to that subsequent taxable transaction and excluded from the gross receipts of that transaction. Thus, no amount of the rentals on daily or short term rentals is excludable from the measure of tax. 6/22/92.

295.1257 **Luxury Tax—Qualifying Lease.** Revenue and Taxation Code Section 6012 excludes taxes imposed by the United States upon or with respect to retail sales. The federal luxury tax is a tax on retail sales which includes leases. When a lessor of a qualifying lease elects to pay the luxury tax up front, he or she is paying a federal excise tax on the lease which is a retail sale. Qualifying lease is a lease with a term of one year or more. Thus, the luxury tax on the lease is a tax imposed by the United States upon or with respect to retail sale, and is excluded from gross receipts. Assuming that the lease is a continuing sale and purchase, the amount excluded is a portion of each rental payment which, if the rental payments are equal, is calculated by dividing the total amount of the luxury tax by the number of rental payments due under the initial term of the lease.

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Where the luxury tax is imposed on rental payments, the amount of the luxury tax on each rental payment is excludable from the measure of tax whether the luxury tax is separately stated or included in the rental payments set forth in the lease. Also, if the lessor elects to pay the luxury tax up front and the lessee reimburses the lessor for the tax at the beginning of the lease, the reimbursement is not included in the measure of tax. 6/22/92.

295.1260 **Motor Vehicle Fees and Taxes.** An automobile lessor electing to base the tax on rental receipts may exclude from the measure of the tax the amount of such registration fees as are allowed by Section 6012(c)(9). There is no prescribed method for excluding this amount; however, records should be maintained which adequately reflect the basis of any exclusion taken. 1/10/61.

295.1266 **Ozone Depleting Chemical Taxes.** The ozone depleting chemical tax imposed by section 4681 of the Internal Revenue Code is a manufacturer's tax and it is included in gross receipts subject to tax. Section 4681 also imposes an ozone depleting tax on the importer. If the product is used by the importer, it is not includable in the measure of use tax. However, if sold by the importer, the federal excise tax is a recovered expense and includable in gross receipts. 6/28/91.

295.1270 **Property Taxes.** If a purchaser is required to reimburse the seller for the property taxes the seller paid as part of the contract of sale, the amount paid to the seller is included in the measure of tax. Personal property taxes are assessed in California as of March 1 of each year. Although the actual bills for the tax are issued after March 1, the person owing the tax is the person who is the owner of the property as of the assessment date, March 1. It is the assessment date that determines the person liable for the tax, not the date on which the bills for that tax are issued. This means that if the seller owned the equipment in question on or after March 1 of the year of sale, the seller is the person owing the personal property taxes. The purchaser was not liable for payment of the tax to the taxing body. Thus, the purchaser would have reimbursed the seller for the seller's payment of the taxes as part of the sales price of the equipment, and such amount would be includable in the taxable measure.

On the other hand, if the sale occurred prior to March 1, meaning that the purchaser owned the equipment as of March 1, then the purchaser was the person legally owing the tax to the taxing body. If such were the case, the amount the purchaser reimbursed the seller for payment of its tax liability would not be included in taxable measure. 12/29/94.

295.1280 **Sales Tax.** Where foreign sales tax is paid to a foreign automobile manufacturer, and the tax is included in the invoice to the California consumer the amount of the tax is to be included in the measure of the California tax. 1/16/69.

295.1300 **Sales Tax.** Measure of tax on rental receipts does not include separately-stated charge for state and local sales tax. 10/29/56.

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295.1302.500 **Tire Disposal Fee.** The California Tire Recycling Act, as amended, imposes a $0.25 per tire disposal fee on every person who purchases a new tire from a retail seller of new tires. The seller is required to collect the fee and remit it to the state, but may retain 10% of the fee as reimbursement for any cost associated with the collection of the fee. (Pub. Resources Code § 42885 (a).)

Prior to January 1, 1997, the California Tire Recycling Act imposed the $0.25 per tire disposal fee on every person that left a tire for disposal with the seller of new or used tires. Where a tire dealer sold a new tire and charged $2.00 for tire disposal as a condition of that sale, the entire $2.00 charge was subject to tax except for that portion of the fee actually imposed on the customer for tire disposal. That is, the entire $2.00 was taxable if a customer did not leave a tire for disposal. If a customer left a tire for disposal, $1.75 of the disposal fee was subject to tax and the remaining $0.25 amount was a nontaxable fee imposed by the state directly on the customer.

The amended provisions of the Act impose the $0.25 fee directly on the purchaser of a new tire whether or not an old tire is left for disposal. Thus, whether or not an old tire is left for disposal, the retailer of a new tire collects the $0.25 fee from its customer as a fee imposed on that customer by the state. That $0.25 is not taxable. Any amount charged in excess of the $0.25 as a condition of the sale of a new tire is subject to tax ($1.75 in the above example).

None of the tire disposal fee charged by a tire dealer who simply disposes of a tire for a customer without selling a new tire is subject to tax because under such circumstances the charge relates entirely to the disposal of the old tire. Furthermore, the customers have the option of leaving the old tire for disposal and incurring an optional disposal fee, or of taking the tire with them and not incurring the fee, the optional disposal fee is not subject to sales or use tax. 3/21/2000. (Am. 2000-3.)

295.1302.850 **Vaccination Fees.** Charges by a local government entity for vaccination fees in connection with its sales of dogs and cats are included in the entity's gross receipts from the taxable sales of these animals when the vaccines are given prior to the sale. 5/16/91.

(This opinion was superseded by section 6010.40, operative January 1, 2000.) (Am. 2000–2).

295.1303 **Vapor Recovery—Certification Fee.** Gasoline stations are required to install a Vapor Recovery System by Health and Safety Code sections 41950 et. seq. The Certification Fee mandated by Health and Safety Code section 41961 (and other associated fees, if any) that are passed along to the customer must be included in the retailer's taxable gross receipts. These are costs of doing business just as are the retailer's rent and utility bills. 7/25/95.

(f) COSTS AND EXPENSES

295.1304 **Airport Fees.** Airport fees are charged by the airport to aviation fuel retailers for the right to conduct business at the airport. Since airport fees represent another cost of doing business, they are included in the measure of sales

tax. The fact that the retailer may subsequently pass such fees on to the purchasing air carrier and separately state such fees on its invoices has no effect on the application of tax. 7/3/96.

295.1305 **Assessment on Citrus Tree Sales.** The California Department of Food and Agriculture levies an annual assessment of one percent upon any licensed nursery dealer on the gross sales of all citrus fruit trees produced and sold within California. Sales tax is applicable to the total charge made by the nursery dealer to its customer whether the assessment is included in the sales price for the trees or whether the assessment is separately stated on the customer's invoice. 5/18/93.

295.1310 **CD-ROM Manufacture.** A taxpayer enters into contracts to produce CD-ROMs for customers. It does not manufacture the disks itself, but subcontracts with out-of-state manufacturers. Molds and silk screens are used in the manufacturing process but do not become a part of the finished product. The out-of-state manufacturer charges a separately stated ''mastering fee'' for the fabrication of molds and silk screens, but it retains title to them. In turn, the taxpayer generally charges its customer a separately stated ''mastering fee.'' However, in some cases, a customer may be quoted a lump-sum price for the ''mastering fee'' and disks.

The ''mastering fee'' whether separately stated or not is part of the charge for the taxpayer's retail sale of the disks. It is immaterial that the molds or silk screens are stored or used outside the state.

The taxpayer also fabricates films from customer furnished artwork. The films are shipped to out-of-state vendors who use them in preparing silk screens and printing plates for disk manufacture and package printing. The customers retain ownership of the films, but generally do not take possession of them. If the taxpayer delivers the films to the customer in California, tax applies to the gross receipts. If the taxpayer ships the films out of state at the customer's direction and the California customer certifies that the films will not be used in California, no tax is due. 4/10/95.

295.1315 **Dealer's Documentary Preparation Charge.** Section 11713.1 of the Vehicle Code allows a vehicle dealer to add to his advertised price a ''documentary preparation charge,'' not to exceed $35. Such a charge is includible in the dealer's gross receipts. 10/6/78.

295.1318 **Disposal/Overhead Charges Made By Repairers.** Whether a disposal or overhead charge for overhead expenses is subject to tax depends on whether the charge is regarded as related to the sale of the parts, the providing of nontaxable labor, or both.

When the overhead charge made by the repair shop is related only to the sale of the parts, the entire charge is subject to tax (e.g., a charge to cover expenses for ordering inventory and storing parts or for transportation of the parts to the repair shop). If, on the other hand, the charge is related solely to the nontaxable labor performed by the repair shop, then none of the charge would be taxable (e.g., a

charge solely to cover expenses related to cleaning the oil remaining on the garage floor after draining oil from car).

The final possibility is that the charge, no matter how it is itemized on the bill to the customer, is actually related to all overhead expenses of the repair shop. The charge would be regarded as related to all overhead expenses of the repair shop if the charge cannot be shown to be clearly related solely to nontaxable labor or solely to the taxable sales of tangible personal property. Under these circumstances, a portion of the charge is taxable and a portion of the charge is not taxable, prorated in the same ratio that itemized taxable charge for parts bears to the itemized nontaxable charge for labor. 1/27/95. (Am. 2000–3).

295.1319 **Energy Surcharge Fees.** A company sells industrial gases and supplies for use in welding operations. The company recently included an ''energy surcharge fee'' on their sales to non-tax exempt customers. This fee is a cost of doing business that the company passes on to its customers and is therefore part of the cost of materials sold to the company's retail customers. The ''energy surcharge fee'' must be included in the taxable gross receipts whether or not they are separately stated in a sales invoice provided to the company's customers. 08/17/01.

295.1320 **Engravings.** Separate charge for cost of engraving made in connection with sale of labels or posters is a part of gross receipts from the sale of the labels and posters. 7/5/50.

295.1330 **Fabrication Labor.** Calibration and other start up procedures performed on flow meters by the out-of-state manufacturer, at its facility rather than the customer's jobsite during installation, is fabrication labor and part of the gross receipts from the sales of the flow meters. This is true, even though the charges for such procedures are separately stated on the invoice of sale. The retail sale of such meters to California consumers is subject to use tax, and the manufacturer is required to collect the tax if it is engaged in business in this state or holds a seller's permit here. In addition, if the out-of-state manufacturer ships these meters to a California consumer, pursuant to a retail sale made by another out-of-state retailer who is not engaged in business in California, the manufacturer has made a retail sale pursuant to Revenue and Taxation Code Section 6007. When this occurs, the manufacturer is considered the retailer and must report the retail selling price of the property, charged by the out-of-state retailer to the consumer, as part of its gross receipts or sales price. 10/12/93.

295.1335 **Fuel Fees.** The Los Angeles Department of Airports has imposed certain fuel fees by resolution. One resolution establishes license requirements and fees to airlines and other companies providing contract and/or into-plane fueling service. A licensee must pay one cent per gallon for all fuel placed into any aircraft. In addition, if a licensee elects to provide into-plane fueling services as an agent for an oil company that does not have a valid fuel delivery permit, the licensee pays five cents per gallon for all aviation gasoline delivered and input into aircraft at the airport. These fees do not apply when the services are provided to a signatory air carrier whose operating agreements with the airport provide that

no such fee should be imposed. The fee imposed with respect to fuel delivered into aircraft appears to be a charge for use of the airport's fuel delivery facilities. As such, when the fuel vendor separately states these charges in an amount that does not exceed the cost to the vendor, these amounts are excludable from the vendor's measure of sales tax as delivery charges (section 6012(c)(7)).

A second resolution provides that permittees pay three cents per gallon for all fuel delivered to the airport and fifteen cents per gallon for all lubricants delivered to the airport. Fuel and lubricants supplied to signatory air carriers are excluded from these charges. These fees are not for transportation to the purchaser, but are charges for the right to conduct business at the airport. These charges are costs of doing business by the permittees and are not excluded from the measure of tax. The fact that the vendors may choose to separately state such charges on their billings has no effect on the application of tax. 8/28/90; 10/25/90.

295.1340 **Hazardous Waste Disposal Fees—Automobile Dismantlers.** An automobile dismantler is required to pay fees for disposal of hazardous or toxic waste such as fluids withdrawn from wrecked automobiles, soil contaminated by oil or coolant leaks, and spills associated with its automobile dismantling operations. A substantial portion of the fees results from disposal of contaminated soil. The taxpayer passes on its costs as separately stated fees on invoices to its customers. The amount of fees passed on to customers is calculated as an allocation of the total of such fees paid by the taxpayer within a given period of time. Each customer is charged approximately fifty to sixty cents irrespective of the type of property purchased or the dollar amount of any purchase.

In this case, the charges are not for fees that are incurred because of repairs to the customer's vehicle. Instead, they are general fees incurred as a cost of doing business. The dismantler pays fees for disposal of fluids it withdraws from wrecked vehicles and for contaminating soil. Hence, such charges passed on to the customers who purchase tangible personal property are includable in the taxpayer's gross receipts. 2/20/96.

295.1360 **Label Designs.** If an artist contracts to make and deliver a particular label, all costs of production are part of taxable gross receipts, regardless of how many labels are made and discarded before the one exactly meeting specifications is produced. On the other hand, if, before contracting to deliver a specific label and before customer becomes obligated to accept a particular item, a number of samples are produced for display and selection purposes, such charges are not taxable.

Upon entering into a contract for the production of the label selected by the customer all costs thereafter incurred in such production are not deductible from gross receipts paid or payable for such label. 6/10/53.

295.1365 **Letter of Credit Charges.** The separate statement of reimbursement for an item of expense incurred under the terms of the sales contract is includable in gross receipts. Therefore, a charge for a letter of credit is subject to tax. 3/15/91.

GROSS RECEIPTS (Contd.)

295.1380 **Mark-up on Repair Parts.** A California railroad makes repairs to foreign line cars owned by others which it uses in California. The scheduled price of repair parts involves a mark-up for handling and purchasing expenses.

The mark-up should be included in the price subject to sales tax. 6/26/53.

295.1384 **Membership Fees.** A taxpayer operated a service whereby it sold memberships which permitted the purchaser thereof to purchase goods at reduced

GROSS RECEIPTS (Contd.)

prices. The lifetime membership fee was $399.90 and there was a charge for the first and second annual account maintenance at $12.00 per year for a total of $24.00.

For sales and use tax purposes, amounts charged and received for such services constitute taxable gross receipts when such services are in connection with sales of tangible personal property and relate to anticipated retail sales. Thus, such membership fees and account maintenance charges are subject to tax. However, if a purchaser never purchased any goods, the fees and charges would not be subject to the tax. The burden of proving that some purchasers never purchased any goods is upon the taxpayer. 4/12/73.

295.1387 **Packing Charges and Government Inspection Costs.** Taxpayer is in the business of selling tree seedlings, live Christmas trees, and container trees which require special packaging for protection from damage before shipping to the customer by UPS. Also, these types of items shipped in interstate commerce are required to be inspected and certified by the U.S. Government. The cost of packaging and inspection certificates is charged to customers.

The cost for labor and materials used in packaging an item before it is shipped is not a part of the transportation and must be included in taxable gross receipts. Also, there is no statute which excludes government inspection costs from the measure of tax or permits a deduction for such costs. Accordingly, such charges are taxable if they are in connection with a taxable sale. 11/15/91.

295.1400 **Severance Costs.** ''Severance costs'' and ''going concern'' value are properly included in taxable gross receipts from a sale constituting a transfer of tangible personal property. 9/15/65.

295.1410 **Smog Control Certification.** With each application to the DMV for initial registration or transfer of registration of certain motor vehicles, a dealer must also transmit a valid pollution control (smog) device certificate of compliance. There is no requirement that the dealer charge the purchaser for transmitting the certificate, but a dealer may choose to make a separate charge for the transmittal and so be specifically reimbursed for that cost of doing business. Such a charge to the purchaser may not be excluded from the amount upon which the sales tax is computed.

The Department of Consumer Affairs is required to make or authorize certain motor vehicle pollution emission inspections of motor vehicles. The Department is required by statute to charge a certificate fee (usually in the amount of $7.00) for the inspection. These fees must be deposited in the State's Vehicle Inspection Fund. Revenue and Taxation Code Section 6012(c)(9) excludes from the amount subject to sales tax any motor vehicle fee or tax imposed by and paid to the State of California that has been added to or is measured by a stated percentage of the sales or purchase price of a motor vehicle. Accordingly, when the fee charged by the Department of Consumer Affairs is paid by a retailer of a motor vehicle and charged to the purchaser, that amount may be excluded from the computation of sales tax due. 5/29/80.

GROSS RECEIPTS (Contd.)

295.1420 **Sorting Lumber.** A retailer entered into agreements with contractors to furnish lumber for home construction at housing tracts. The retailer ordered the lumber from mills and had it delivered to him at a reception site in the tract area. The retailer sorted the lumber at the reception site and delivered lumber of requisite dimensions to individual construction sites. Although the retailer billed the contractor on two separate invoices, the first invoice for the retailer's cost of the lumber and the second invoice for the retailer's charge for sorting the lumber and delivering the sorted lumber to individual construction sites, the amounts charged on both invoices constituted the retail selling price of the lumber. 9/3/65.

295.1430 **Vehicle Biennial Smog Exemption.** Effective July 1, 1994, purchasers of new vehicles or of commercial vehicles are allowed to defer their first smog certification renewal from the current two years after purchase to four years by checking a box so marked on the application for registration and by paying an additional $39 at the time of the initial purchase. Any change in ownership would nullify this exemption, other than the removal of a lessor's name from the registration of a leased vehicle.

The entire $39 is transferred to the state: seven dollars goes to the DMV's vehicle inspection fund, the same as the smog certificate fee in the regular program, even though no certificate is issued for this new extension; and the remaining $32 goes to a special fund created for this purpose and maintained by the Bureau of Automotive Repair.

If the purchaser elects to purchase the extension, the dealer must collect the $39, include these charges on the sales contract, and remit each portion of the fee to the appropriate agency. Revenue and Taxation Code Section 6012 (c)(9) excludes from the measure of sales tax any motor vehicle fee or tax imposed by and paid to the State of California that has been added to, or is measured by a stated percentage of the sales or purchase price.

While electing to purchase the Smog Biennial Exemption is an option available to the new car buyer, once the election is made, the fee becomes mandatory. However, since the entire $39 of this new smog renewal extension is imposed by the state, as a fee added to the selling price of the new vehicle, it is excludable from the measure of sales tax, assuming it is separately stated on the sales contract and paid to the state by the dealer. 8/1/94.

295.1440 **Wages Paid to Temporary Help.** Wages paid by a caterer for outside help to serve meals, tend bar and wash dishes are not deductible from taxable gross receipts for selling meals, even though the amount thereof is separately stated to the customer. 2/15/67.

295.1460 **Wrapping and Packing by Seller.** In the ordinary sale no deduction is allowable to the retailer on account of the cost of wrapping and packing the goods sold, whether or not such a charge is separately stated.

If title to the merchandise passed to the buyer at the time of completion of the order and thereafter the retailer merely holds the merchandise as bailee, the later additional charge for wrapping and packing is nontaxable, except as to that portion representing the sales price of the wrapping or packing material

GROSS RECEIPTS (Contd.)

furnished. Such material is, of course, regarded as sold along with the merchandise, and since the original billing did not include the sales price of this merchandise it would necessarily be included as a part of the subsequent billing for wrapping and packing. 11/3/50.

(g) SERVICE CHARGES GENERALLY

See also Service Enterprises Generally. Engineering, design, research and production, charges for, see also Service Enterprises Generally.

295.1479 **Administrative Expense Charges.** An out-of-state retailer is registered with the Board for collection of California use tax. The retailer adds a separate charge on the customer's invoice for administrative expense. This charge represents a recapture of the retailer's administrative expenses associated with the invoice (sale). The charge is calculated as a percentage of the merchandise amount on the invoice. The ''sales price'' includes all charges for labor, service, and administrative costs associated with the sales of the property, including administrative expenses associated with the invoice. Accordingly, the taxpayer's recapture charge is subject to California tax. 11/26/96.

295.1480 **"Administrative" Fee.** A cooperative type store, housing numerous concessionaires will sell to members merchandise at prices below average retail. To all prices will be added a 6% administrative fee. This fee, even though separately stated, is a part of the selling price and includible in taxable gross receipts. 11/23/54.

295.1484 **Administrative Service Fee.** A taxpayer is a commercial artist who also provides media placement services. She also contracts to provide administrative services to some clients on a monthly flat retainer fee. The taxpayer charges time against this retainer fee. The administrative services consists of supervision over various projects of her customers. Some of the projects include the production of finished artwork. In such cases, the administrative charges are subject to tax pursuant to section 6012(b)(1) as services that are a part of the sale of tangible personal property. 11/13/91.

295.1491 **C. O. D. Sales.** A taxpayer in the business of selling beauty supplies makes C. O. D. sales. The taxpayer pays the carriers for freight and C. O. D. charges in advance. The carriers collect the selling price of the merchandise, shipping costs, and C. O. D. fees from the customers and remit the entire amount to the taxpayer. The taxpayer's invoices separately state the merchandise cost, tax on that amount, shipping charges, and C. O. D. fees. The taxpayer believes that the C. O. D. charges are charges for service and, thus, not subject to tax.

Section 6012 provides that ''gross receipts'' include, among other items, services that are a part of a sale of tangible personal property. The taxpayer's C. O. D. charges are part of the taxpayer's cost of doing business and are paid to the taxpayer for services that are part of the sales that the taxpayer makes. The charges are therefore taxable gross receipts. 6/9/81.

GROSS RECEIPTS (Contd.)

295.1495 **Consumer Cooperatives.** A consortium of retailers who band together to reduce operating costs is not a ''consumer cooperative'' in the context of the Sales and Use Tax Law. Amounts paid as initial periodic membership fees may not be excluded from the retailers' gross receipts pursuant to Section 6012.1. 9/21/93. (Am. 2000–2).

295.1500 **Credit Card Service Charge.** An amount labeled as a service charge, which a grocery store charges customers who purchase goods under bank credit cards in order to compensate itself for the charge which the bank charges the grocery store, constitutes part of the price of the goods sold. 4/19/68.

295.1502 **Custom Business Forms—Handling Charge.** A manufacturer produces, stores and distributes custom business forms for its customers. After production, the forms are moved into storage. As the customers request forms, they are billed for the amount released, plus a handling or release charge. The handling or release charge is a service that is part of the sale and is subject to tax. 9/22/88.

295.1503 **Designer Fees.** There is no general exemption for the sales of custom made property. Although the manufacture or production of custom-made property necessarily involves design work or similar types of creative services, the services required to produce the property in the form desired by the customer are generally taxable as services that are ''part of the sale.'' If the customer contracts solely for design services and there is no associated transfer of tangible personal property, tax does not apply. If the customer then contracts separately for production of the property in accordance with the design, the charge for the property is taxable while the charge for the design work remains nontaxable. However, where sketches and patterns are transferred to consumers, tax applies to the transaction as measured by the amount charged for the sketches and patterns because it is itself a sale of tangible personal property.

When the parties enter into separate contracts for design services and also for the production of custom property, and the charge for the property is unrealistically low, it could be viewed as evidence that a portion of the design fees was in fact being paid for the property. This could lead to the conclusion that the design services and the property were being sold together as a ''package'' and tax would be due on the entire amount charged. 5/31/91.

295.1505 **Editing and Duplicating Videotapes.** A videographer (1) makes videotapes for weddings, birthdays, etc.; (2) edits customer's home videos; and (3) duplicates customer's videos.

A charge for video photography for a client is subject to sales tax even if the client provides the videotape and camera. Motion pictures produced for private non commercial use, such as weddings, etc., are excluded from ''qualified motion pictures''. Sales tax applies to the charges for the videotapes. Assuming that the customer's videos are for private, non commercial use, tax applies to charges for editing home videos and tax also applies to charges for duplicating customer's videos. 1/7/93.

GROSS RECEIPTS (Contd.)

295.1506 **Engineering Drawings.** Engineering drawings required by a contract for the manufacturing and installation of a custom built pipe organ are considered to be services which are part of the sale of tangible personal property. Accordingly, the receipts from the drawings are includable in taxable gross receipts whether or not they are billed to the church before the organ is produced.

Whether an organ is considered ''machinery and equipment'' or ''fixtures'' under Regulation 1521, installation charges are not included in gross receipts. However, any onsite fabrication is subject to tax. 11/16/64.

295.1506.150 **Expedite Charges.** A manufacturer takes three to four weeks to ship ordered goods to customers. Those customers who require quicker delivery can have their goods shipped in five working days for the payment of a 25% premium above the listed price of the goods purchased.

The 25% expedite charge is part of the gross receipts from the sale because it is a charge for services that are part of the sale, i.e., an amount required to be paid to obtain the goods in the desired time. 10/30/91.

295.1507 **Handling Charge.** A handling charge is subject to tax when it is considered part of a taxable sale of tangible personal property, even if separately stated. If the sale is not subject to sales tax, such as a sale where all items are purchased for resale, the handling charge is likewise not subject to sales tax. If the sale is partly a taxable retail sale and partly a nontaxable sale (resale), the handling charge is prorated between the taxable part of the sale and the nontaxable part of the sale, provided that the handling charge relates to both parts of the sale.

If the handling charge relates solely to the retail sale of the property, it is fully taxable even if part of a mixed invoice. For example, the taxpayer makes a taxable sale of tangible personal property for $50 and provided a nontaxable service for $50 unrelated to the taxable sale. The taxpayer adds a $3 handling charge to the invoices which relates to the handling of the property. The taxable gross receipts would be $53 since the handling charge relates solely to the taxable sale. 9/8/94.

295.1507.150 **Handling Fees and Cutting Fees.** The handling fees are incoming shipping fees that a company issues on special orders. The fees are ''passed on'' to the customer that placed the order. The cutting fees are labor costs charged to a customer for cutting poster boards, illustration boards, or paper purchased by the customer or brought in by the customer who wants the item cut into smaller pieces.

The handling fees are merely an expense and are not deductible from gross receipts. They do not come under the transportation exclusion because that exclusion applies only to transportation costs from the retailer's place of business to the customer. The cutting fees are taxable labor sales. The cutting of the board is taxable fabrication labor on the customer's own item. The charges to the customer for such cuts constitute a ''sale'' subject to tax. A ''sale'' includes the fabrication of tangible personal property for a consideration for consumers who furnish the materials used in the fabrication. 3/12/92.

GROSS RECEIPTS (Contd.)

295.1508 **Initial Membership Fee.** When an initial membership fee to purchase cosmetic products from a manufacturer includes a training manual, a product brochure, and a video tape, the purchaser (a.k.a. the distributor) is receiving tangible personal property in exchange for the fee. Under these circumstances, the initial membership fee is subject to tax. 1/20/93.

295.1509 **Interior Decoration—Gross Receipts.** Where an interior decorator designs and has manufactured some or all of the furniture provided to a client under a decorating contract, the charge for design, placing the order, overseeing the manufacture, etc., is part of the gross receipts from the sale of the furniture. Such charges cannot be exempted merely by describing them as a ''design fee.'' 4/11/78.

295.1509.700 **Interior Decorator and Designer Services.** Generally, designers and decorators charge a fee which may be a negotiated amount or a percentage of the selling price of furnishings, labor, and professional services.

Fees for bonafide professional services such as consultation, layout, coordination of furniture and fabrics, selection of color schemes, and supervision of installations, etc., are nontaxable. Billings for such nontaxable fees should be separately stated from fees related to sales of tangible personal property.

Fees charged in connection with acquiring and providing furnishings or other tangible personal property are taxable. A fee charged solely for accompanying a client to showrooms or for otherwise assisting in or recommending the selection of the furnishings is considered part of the taxable selling price of decorator fee. However, tax does not apply to charges for such services when no sales of merchandise are made. Normally, the selling price of the furnishings on which an interior decorator computes tax should be the ''retail'' price; that is, cost to the interior decorator plus a reasonable markup.

If furnishings or other kinds of tangible personal property are billed at cost and a separately stated fee charge includes overhead, profit, etc., directly related to the property sold, as well as other charges, the total fee charged will be considered subject to tax, unless it is established that a portion of the fee is for nontaxable professional services as described above. 5/29/96.

295.1520 **Layaway Service Charge.** A fee charged for setting aside merchandise at the request of a customer is includible in the computation of ''gross receipts'' for that transaction provided the customer completes the purchase by paying the full retail price plus the fee. However, where the contract to sell is not completed and does not result in sale, the service charge is not subject to the tax since there is no sale of tangible personal property. 6/26/62.

295.1535 **Management Fees.** The company enters into an agreement with various providers to furnish medical equipment and supplies to the provider's customers. Under the agreement, it purports to purchase and sell the property to the provider for resale and it receives a ''management fee'' for its services.

According to the agreement, the company:

(1) takes the orders directly from the customers

(2) delivers the items to the provider's customers

GROSS RECEIPTS (Contd.)

(3) sets up the equipment

(4) trains the customers, as necessary, to use the equipment

(5) handles providers customers' complaints

(6) bills the provider's customers or insurance company, showing the providers as the sellers or lessors

(7) receives checks from customers and deposits them in the provider's bank account

(8) takes necessary collection action, and

(9) maintains an inventory ''as is necessary'' to fill orders

Under the agreement, the company appears to be the sole contact point with the customer. It acts as if it is purchasing for its own account rather than on behalf of others. Under these circumstances, it is the retailer of the equipment and supplies. The ''management fees'' are part of the company's gross receipts. 3/22/93.

295.1536 **Marketing Consultation and Materials.** A business provides consulting services with respect to marketing strategy. The end result is a written report which is given to the customer. The report recommends ''corporate positioning and/or thematic direction for acceptance by the client before approval is given to commence creative services.'' For some customers, the business also provides tangible personal property such as brochures in addition to the reports.

If the consultation services are rendered prior to entering into any contract for tangible personal property, only the charges related to the tangible personal property are taxable. If there is a single contract for both consultation and property, the consultation will be regarded as a service related to the sale of the property and the entire charge will be taxable. 2/1/94.

295.1537 **Membership Card.** A firm sells a membership which entitles the buyer to a special rate at a play fitness center plus a club shirt, canister of balls, free two-hour pass to the center, a quarterly magazine, and a club membership card.

Tax applies to the fair retail selling price of the shirt and the canister of balls. If the fair retail value cannot be ascertained, tax applies to the entire club card fee. 6/11/90.

(Note subsequent statutory change re periodicals)

295.1538 **Membership Fee—Board of Realtors.** A Board of Realtors charges its members a one-time fee to become a member. The member must then pay an additional ''membership fee'' each month which allows the customer access to an on-line data base of listed properties (extracts of which may be downloaded) and the right to purchase Multiple Listing Service (MLS) publications which are billed separately.

The nonprofit organization also governs the ethical and professional, conduct of its members and takes complaints on such issues. It also provides education for realtors and issues all legal briefs issued by the state and federal authorities.

GROSS RECEIPTS (Contd.)

Based on the extensive services provided by the Board of Realtors, it is concluded that the membership fees are not related to the anticipated retail transactions (sale of MLS publications). The true object of the membership fee is for the services provided by the Board of Realtors, and the right to purchase certain products is a nominal benefit. The membership fee should not be included in the measure of tax for the publications. 2/27/96.

295.1541 **Membership Fees.** A membership fee entitles a member to discounts on food in a hotel's dining room, brasserie and coffee shop, and on 35% of the beverage check in the liquor lounge. Members also are entitled to a 50% discount on rooms, a complimentary ''sleeping room'' night, and complimentary use of tennis courts, swimming pools, parking lots, and airport shuttle.

Although membership rights include discounts on taxable sales, the primary benefits are the right to receive discounts on the nontaxable hotel services. For this reason, the membership fees are not subject to sales tax since they are sales of an intangible right to receive these benefits. 6/29/90.

295.1580 **Membership Fees.** An operator of a merchandising service charges subscribers $60 for the first year and $10 per year for renewal. In consideration of such service, he sells merchandise to subscribers at wholesale prices. The initial membership and renewal fees are so related to anticipated retail sales as to be includible in taxable gross receipts. 9/1/65.

GROSS RECEIPTS (Contd.)

295.1585 **Miscellaneous Charges Made In Conjunction With Sales of Jet Fuel.** A retailer sells jet fuel to air carriers at a municipal airport. The separately stated charges by the retailer on sales of jet fuel to purchasing airlines and its tax application are set forth below:

(1) Throughput Fees—These are fees charged to the retailer by the airport agent. The retailer arranges verbally with an ''into plane agent'' at the airport to store and deliver fuel as needed to its customers. The retailer delivers or causes to be delivered sufficient fuel to the airport agent's storage to cover its sales. The retailer owns the fuel.

The throughput fees, if for temporary storage of the retailer fuel, would be subject to tax since there is no exclusion from the measure of tax for storage fees. The contrary argument is that a throughput fee is a nontaxable transportation charge, as with the ''into plane fees'' in (2) below, on the ground that all carriers sometimes incidentally store goods temporarily in the course of moving goods from one point to another, and ordinarily an allocation is not made between storage and transportation. For example, if the retailer placed fuel with the airport agent with explicit instructions that the fuel was needed immediately by an air carrier and should be transported as quickly as possible to the air carrier's plane, the same throughput charge would nevertheless apply, and it would be difficult to show more than storage incidental to transportation. A storage fee would increase as the period of storage increased; throughput fees are a fixed amount per gallon.

Accordingly it is concluded that a separately stated throughput fee is a nontaxable transportation charge.

(2) Into Plane Fees—''Into plane fees'' may be used to describe local tax charges, service fees or commissions.

''Into plane fees'' which represent a charge to a retailer by an airport agent to deliver or cause fuel to be delivered into a purchaser's aircraft from a storage facility at the airport may be excluded from the measure of tax as transportation charges pursuant to section 6012(c)(7) provided that the charge is separately stated to the retailer's customer.

Such charges may relate to deliveries both by fueling trucks and through fuel distribution systems at the airport.

''Into plane fees'' which represent a charge by the airport authority as a retailer would not qualify as a transportation charge since it represents a charge for movement within the retailer's place of business. Likewise, such a charge from an airport authority which wholesales fuel to retailers is not a transportation charge which is excludable from the measure of tax but rather a service prior to the retail sale by the retailer. In essence, it is a charge by the wholesaler for movement of goods within the wholesaler's ''place of business.''

''Into plane fees'' which represent a local tax charge or commissions represent a cost of doing business for the retailer and such charges are not excludable from the measure of tax.

(3) Ground Power Unit Fees—These are charges to the retailer by the airport agent to reimburse the agent or delivery party for ground equipment used in fueling and servicing the aircraft, i.e., engine starter, generator, pushtruck, etc.

GROSS RECEIPTS (Contd.)

These charges appear to be primarily for the rendering of services not related to sale of tangible personal property (with the exception of ground equipment used in refueling—e.g., hydrant truck/cart). Such services include the providing of electrical power, air pressure for engine starts, washing of windows, pushing of the aircraft from parking stalls, etc. These services are not contingent upon the purchase of fuel.

With the exception of the charge for ground equipment used in refueling, i.e., the hydrant cart, the remainder of this charge is unrelated to the sale of tangible personal property and is, therefore, nontaxable. If the charge for the hydrant cart was separately stated, it too would be nontaxable. This latter charge is minor in relation to the total charge and it is impractical for the retailer to separately state the charge for the hydrant cart. Therefore, the retailer ground power unit fee should be treated as a nontaxable service charge.

(4) Flowage Fee and/or Airport Delivery Fee—This is a charge to the retailer by the airport and is subsequently passed on to the purchasing air carrier. The municipal airport charges oil companies and others supplying petroleum products to tenants and users at the municipal airport a gallonage fee for the right to conduct business at the airport.

This fee charged to the retailer and passed along by the retailer to the purchaser is another cost of doing business and, accordingly, is included in the measure of tax. The fact that the retailer may choose to separately state such charges on its billings has no effect on the application of tax. 7/20/73; 4/3/75; 11/18/86. (Am. 2000–1).

295.1590 **Monthly Rental Fees—Video Cassettes.** A machine based video library is implemented at large residential apartment complexes. Residents pay a monthly fee to be a member of the library on a month-to-month basis, without being required to be a member for additional months. For this fee, they receive unlimited borrowing privileges from the library. To prevent hoarding of video cassettes, a penalty fee is imposed on overdue items.

This program is an arrangement to lease video cassettes and is considered a sale and purchase. The membership fees are rentals payable from the lease of the video cassettes and are subject to tax. The only exception would be when a member borrows no cassettes for the month to which the membership fee relates. Penalty fees which are required to be paid relate directly to the lease of video cassettes and are also subject to use tax. 7/9/90.

295.1600 **Pharmacist's Fee.** A pharmacist's yearly charge for professional services to a family which includes being on 24-hour call, keeping a file of the family's prescriptions, pricing sales at a cost plus 10 percent basis and supplying a yearly itemization of tax-deductible expenditures is not subject to tax. The fee, being in the nature of a membership charge, is the same whether any sales are made or not and is not affected by the number or amount of yearly sales. 1/18/65.

295.1630 **Photography Franchise Fee.** A company is a franchisor of its photographic and sales techniques, methods, and procedures. Under the franchise agreement it agrees to furnish ". . . all film, paper forms, order books, mounts,

prints, processing service and delivery service necessary to carry out the business of (the franchisee) a photography studio.'' The company receives a percentage of the franchisee's gross sales for these services, supplies and counsel.

The film and processing services furnished to franchisees are ''sold'' within the concept of that term as used in the Sales and Use Tax Law. The fact that the price of the items sold is determined by a percentage of the franchisees' gross receipts is immaterial. Tax does not apply to those items shipped in interstate commerce pursuant to the contract of sale or sold for resale. 7/31/73.

295.1640 **Procurement Fee.** A supply company agreed to obtain furniture and fixtures for the outfitting of a hotel. It was to be compensated at the rate of 5 percent of the cost of such furniture and fixtures. Where the supply company placed orders for such property with vendors, on behalf of the hotel, and the invoices were made out to the hotel as purchaser; the supply company acted in the capacity of agent for the hotel. The 5 percent fee, measured by the cost of such property, which the supply company received was an exempt service charge.

Where the supply company purchased furniture and fixtures as a franchised dealer under its own resale certificate, it did not act in the capacity of an agent. It purchased such property for its own account for resale and resold it to the hotel corporation. Therefore, its entire receipts from such transactions, including the 5 percent, constituted taxable gross receipts. 10/30/64.

295.1660 **Preliminary Typing of Ditto Masters and Mimeograph Stencils.** Where a public stenographer specialized in the reproduction of architects' specifications and had to obtain architects' approval of preliminary work prior to making copies by mimeograph and ditto, the preliminary work was not a taxable service in connection with the sale of the mimeographed copies. The preliminary work consisted of organizing the architects' figures and typing ditto masters and mimeograph stencils with carbon copies, which she gave to the architects for approval. The stenographer billed for the various services separately and there was usually a lapse of two weeks to one month while the architects reviewed the work and gave their approval. 7/20/64.

295.1661 **Premium Fee Charged By Auctioneer.** An auctioneer holding an auction on the campus of a university added a ''premium fee'' of 10% of the sales price to the invoice of all property sold at the auction. While the customers were told that the fee was tax deductible as a charitable donation, the premium fee represented reimbursement to the auctioneer for charges made by the university to hold the auction on campus.

There is no provision under section 6012 to exclude such charges from taxable gross receipts. Accordingly, the amount is subject to tax. 1/30/91.

295.1663 **Real Estate Association Membership Fees.** Membership fees for real estate trade associations entitle members to a variety of services. The services include local lobbying, public relations, business network meetings, a local magazine or newsletter, information and education, adherence to code of ethics,

enforcement of professional standards, and arbitration of disputes between buyers and sellers and between brokers and agents.

Some trade associations may operate a real estate store which sells standard real estate forms, signs, and other tangible personal property related to the real estate business. In some locations, the stores are open to the public, while other locations are open to members only. Where the stores are open to nonmembers, a nonmember may pay a higher price for the merchandise sold than to a person who is a member.

In view of the extensive services provided by the real estate trade associations to their members, it is evident that they are essentially service organizations. Therefore, under subdivision (a)(2) of Regulation 1584, charges for membership fees are not subject to sales or use tax. The true object of the real estate trade association membership is that the members benefit from the services provided by the association which are unrelated to anticipated retail transactions. 1/25/96.

295.1665 **Referral Fee Added to Repair Invoice.** A taxpayer provides automotive glass repair and replacement services through a national network of affiliated subcontractors and company (taxpayer) owned stores. The taxpayer also has a reservations division to which a customer needing glass services calls. The reservations division refers the customer to one of the taxpayer's repair shops or affiliated repair shops in the customer's home area.

After the home office of the taxpayer receives an invoice from the repair shop, the taxpayer issues an invoice to the customer (which may be an insurance or leasing company). The amount of that invoice includes the amount billed to the taxpayer by the repairer plus a ''referral fee'' which is recovered by increasing the materials and labor components of the repair shop's invoice by a pre-determined percentage or amount. The sales tax invoiced by the repair shop is also added to the total and passed on to the customer. The invoice shows amounts for parts, labor, and tax, without a separately itemized charge for referral. The taxpayer does not add additional sales tax to its invoice based on its mark up for the referral service fee.

The taxpayer is making retail sales of tangible personal property inside this state when its subcontractors or its own repair facilities furnish parts and materials to its California customers. Tax applies to the taxable gross receipts from the retail sale of the parts installed. The ''mark up'' on the parts representing a portion of the taxpayer's referral fee is part of the amount subject to sales tax. The taxable gross receipts from the sale of parts includes the entire charge for those parts, including any mark up for the referral fee.

Where the repairs are performed by a subcontractor, the taxpayer should provide the subcontractor with a resale certificate to cover the sale of the parts by the subcontractor to the taxpayer. 1/31/96.

295.1671 **Separately Stated Sorting Charges.** Charges for sorting lumber after the lumber arrives at a compound near a construction site are subject to tax. Such charges are services in connection with the sale as contemplated by section 6012. Additionally, the charges represent taxable processing under section 6006(b). 10/10/66.

GROSS RECEIPTS (Contd.)

295.1675 **Service Charge.** A used car dealer adds a service charge for bookkeeping and for handling a customer's vehicle insurance account. Since the charge is mandatory, it is part of gross receipts and subject to tax. 5/13/94.

295.1675.600 **Service Charge for Sale of Firearms.** Since the change in the law requiring private parties to sell firearms only through licensed dealers, a company asks whether the fee it charges to file the required state paperwork to the Department of Justice is subject to tax.

Whether the company is liable for sales tax on the transaction depends upon whether the company is the retailer of the firearms. If an owner of a firearm and a purchaser have negotiated the terms of the sale in advance and then bring the firearm to the company to meet the statutory requirements of the Penal Code, the company is not the retailer of the gun and does not owe tax on the fee or any other charges for the firearm. If, however, an owner of a firearm brings the gun to the company and requests the company to find a buyer, the company is the consignee and the retailer of the firearm, and is liable for sales tax on the sale. In that case, the company must include all fees and charges in the measure of tax. 1/9/92; 2/20/92. (Am. 99–2).

(Note: On and after January 1, 1999, the Department of Justice fee is not includible in the measure of tax, but all other charges remain subject to tax.)

295.1678 **Services in Connection with Sales of Catalogs.** A taxpayer operates three ''catalog showroom'' retail stores in California. The taxpayer purchases its catalogs from an out-of-state firm that has developed a comprehensive program for production of a basic catalog each year that could be used by a number of different catalog-showroom firms with relatively simple and inexpensive customizing as to any particular user.

The catalog development firm has the catalogs printed by another out-of-state firm. The taxpayer believes that the out-of-state catalog development firm performs services that are not part of the actual production of the catalogs and that such charges should be excluded from the amount subject to tax. These services include but are not limited to:

(1) Selection of merchandise for inclusion in the catalog;

(2) Negotiating all merchandise purchase terms with suppliers, then organizing this information and supplying it to member firms;

(3) Acting as a clearing house for merchandise problems of member firms;

(4) Providing data processing assistance to members;

(5) Providing in-store fixture layout assistance to members on request;

(6) Coordinating buying conferences;

(7) Maintaining product updates;

(8) Handling special purchases for members.

Typically, each catalog-showroom retailer (including taxpayer) executes a contract with the catalog development firm in the spring of each year, agreeing to purchase a certain number of copies of the out-of-state firm's basic ''Fall'' catalog. The contract includes details concerning customizing the catalog to the retailer's particular identity and preferences.

GROSS RECEIPTS (Contd.)

The taxpayer and the out-of-state firm contracted for the sale/purchase of catalogs on the basis of a quoted price per basic catalog, subject to adjustment for additional or nonincluded inserts/sections and/or special charges, such as handling.

Based on the following, it is concluded that all of the out-of-state firm's charges for services in connection with the sale/purchase of the catalogs are subject to tax:

(1) The contract shows that the agreement is one for the sale/purchase of catalogs only, with the price expressed as a charge for each copy of the catalog.

(2) The more important of the activities described as ''services'' are simply a catalog pricing arrangement. The out-of-state firm performs these activities in a proprietary capacity while developing a basic catalog ''package'' which it sells to many customers each year via contracts for sale of catalogs. The activities described as ''coordinating buying conferences,'' ''selections of merchandise for inclusion in the catalog,'' ''negotiating merchandise for inclusion in the catalog,'' ''negotiating merchandise purchase terms with suppliers'' (and thereafter furnishing copies of forms containing the resulting information to all member firms who purchase catalogs), and ''maintaining product updates'' are not services that are provided to the customer's special order for just its needs. Instead the out-of-state firm is selling a pre-packaged product, of which such activities are a part. These activities cannot be separated for the purpose of establishing the product's sale price. Even if the contracts had been written in a form giving special mention to the above services, so as to assign part of the price per catalog to them, the Board would be unable to recognize an exempt status for any of the amounts so assigned. 8/16/78.

295.1690 **Services that are a Part of the Sale.** ''Services that are a part of the sale'' include any the seller must perform in order to produce and sell the property, or for which the purchaser must pay as a condition of the purchase and/or functional use of the property, even where such services might not appear to directly relate to production or sale costs. Thus, charges described by a seller of catalogs as for preproduction research and consultation services and for postproduction merchandising consultation services are part of the taxable sales price of the catalogs, whether separately stated or not. The first ''service'' is a necessary prelude to catalog production; and the second is furnished only to catalog purchasers who are required to pay for the service when they purchase the catalogs, whether or not it is desired or used. 8/16/78.

295.1700 **"Setting Up" Equipment.** Service charges for a factory trained serviceman to set up equipment sold by the taxpayer and to supervise its initial operation are exempt installation charges, provided no fabricating, assembling, or processing occurs in the ''setting up.'' 12/7/65; 5/15/85.

295.1710 **Short Load Fees.** A short load fee is a mandatory charge the customer must pay for purchasing less than a full load of concrete. It is similar to an expedite or handling charge and is includible in gross receipts subject to tax. 11/26/97. (M99–2).

GROSS RECEIPTS (Contd.)

295.1720 **Special Parts, Charge for Obtaining.** Telephone expense and transportation charges incurred by a seller in connection with obtaining special parts for customers are charges which may not be deducted from gross receipts. 3/26/53.

295.1760 **Television Sets and Antenna.** Separate charges for installation of television sets and antenna, as well as charges for other services after sale is complete, e.g., instruction or adjusting, are not taxable. 1/17/51.

295.1780 **Television Lease Agreements.** A transaction whereby a taxpayer enters into an agreement with a hotel to lease television sets for determinate periods for fixed monthly payments, with the lessor agreeing to install and maintain the appliances for the period of the lease, together with a supplemental agreement giving the lessee an option to purchase the appliances for nominal fees, is considered a sale of the sets, and no amount may be excluded from taxable receipts on account of the services rendered inasmuch as the customer is given no option in respect thereto. 4/14/60.

295.1800 **Testing Charge.** Testing of steel tubing by the manufacturer for which a separate charge is made is a service which is part of the sale and the charge is part of the gross receipts subject to tax. 1/23/50.

295.1804 **Tire Removal Fees.** At an auto dismantler's yard a customer selects a tire which is mounted on the original wheel. The dismantler charges a few dollars for the removal of the tire from that wheel. The customer pays for this service in advance. The customer then has the option to purchase the removed tire or not. The taxpayer's procedure generally destroys the rim so it can no longer be used or resold.

Separately stated charges for removing used tires from their rims, which tires are then sold to the customer, are charges for a service which is part of the sale of the tangible personal property, i.e., the tire. In that case, the tire removal fee is taxable. On the other hand, if the customer pays the removal fee and then rejects the tire, the fee constitutes a charge for a nontaxable service.

Lastly, if title to the tire and wheel is passed to the customer prior to their separation and the separation is truly optional, the charge for the separation of the tire from the wheel is not subject to sales tax. The separation of the tire from the wheel is a service performed on the customer's property that does not constitute taxable fabrication labor. 2/20/96.

295.1806 **Truck Charges.** ''Truck charges'' are made on all service calls to repair equipment, whether or not any parts and materials are sold. This charge is not to insure that the truck is stocked with parts that might be needed for repairs. Rather, the ''truck charge'' is a charge for transporting a service person to a service call so that services may be performed. Therefore, the ''truck charges'' are not includible in taxable gross receipts from the sale of repair parts as long as the parts are sold for a fair retail selling price. 2/4/98. (M99–2).

GROSS RECEIPTS (Contd.)

295.1810 **Vine Cuttings.** A taxpayer operates a nursery. Annually it plants vine stems in the ground to be grown for nine to ten months. After a few frosts, the plants are dormant. The taxpayer digs them out of the ground and ties them into large bundles and the stems are placed in temporary storage.

Orders for the majority of the vine stems were taken prior to the planting. However, the plantings are not identified to any specific customer. Once the rootings are dug up, the customers are notified to pick up their order. Most customers pick up the untrimmed rootings. However, in about 10% of the cases, the taxpayer trims the rootings prior to delivery. The customer is billed separately for the trimming service.

The taxpayer stated that the trimming was done because the unusually wet weather delayed planting. The delay during warmer weather caused unwanted sprouting.

Title to the stems did not pass until after the trimming. Accordingly, the charge for trimming is part of gross receipts. Even if title had passed, the charge for trimming would be taxable processing labor. (Regulation 1526(b)). 1/6/84.

295.1820 **Wharfage Charges.** Fees collected by a port for the privilege of passing merchandise through the wharf facilities are includible in the measure of the sales tax. The charge constitutes a labor or service cost and an expense, which is passed on to a customer as a part of the sale similar in operation to a service station pumping gasoline into an automobile. 9/5/74.

295.1930 **Supervision.** When a person supervises the fabrication of tangible personal property supplied directly or indirectly by the customer, and that supervision is considered to be a necessary component of the fabrication, the supervision is considered to be a part of the fabrication of tangible personal property. On the other hand, when a person provides consulting services only, without having control over the performance by others of the fabrication, such consulting services are not regarded as part of the fabrication. 1/12/90.

295.2000 **Surcharge on Credit Card Sales.** In addition to the price listed for the merchandise, a retailer charges customers a two percent surcharge on credit card sales. This surcharge is imposed to reimburse itself for the cost of processing the credit sale through the card issuer. The surcharge amount is part of the consideration for the sale of the tangible personal property, and is therefore part of gross receipts subject to sales tax. 11/14/91.